No. 15-5040 *** CAPITAL CASE ***

Title: Terrance Williams, Petitioner
v.
Pennsylvania

Docketed: July 1, 2015

Linked with 14A1161

Lower Ct: Supreme Court of Pennsylvania, Eastern District

Case Nos.: (668 CAP, 669 CAP)

Decision Date: December 15, 2014

Rehearing Denied: February 18, 2015

Questions Presented

--Date--	-----Proceedings and Orders----------
May 7 2015	Application (14A1161) to extend the time to file a petition for a writ of certiorari from May 19, 2015 to July 18, 2015, submitted to Justice Alito.
May 12 2015	Application (14A1161) granted by Justice Alito extending the time to file until June 18, 2015.
Jun 12 2015	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 31, 2015)
Jul 24 2015	Brief of respondent Pennsylvania in opposition filed.
Aug 7 2015	Reply of petitioner Terrance Williams filed.
Aug 13 2015	DISTRIBUTED for Conference of September 28, 2015.
Oct 1 2015	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Nov 6 2015	The time to file the joint appendix and petitioner's brief on the merits is extended to and including November 30, 2015.
Nov 6 2015	The time to file respondent's brief on the merits is extended to and including January 13, 2016.
Nov 10 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the petitioner.
Nov 13 2015	Consent to the filing of amicus curiae briefs in support of either party or of neither party received from counsel for the respondent.
Nov 30 2015	Joint appendix filed. (Statement of costs filed.)
Nov 30 2015	Brief of petitioner Terrance Williams filed.
Dec 7 2015	Brief amicus curiae of Constitutional Accountability Center filed.
Dec 7 2015	Brief amici curiae of Former Judges with Prosecutorial Experience filed.
Dec 7 2015	Brief amici curiae of The Ethics Bureau at Yale, et al. filed.
Dec 7 2015	Brief amicus curiae of The American Bar Association filed.
Dec 7 2015	Brief amici curiae of Former Appellate Court Jurists filed.
Dec 7 2015	Brief amici curiae of Brennan Center for Justice at NYU School of Law, and Justice at Stake filed.

Dec 7 2015	Brief amici curiae of The American Civil Liberties Union, and The ACLU of Pennsylvania filed.
Dec 7 2015	Brief amicus curiae of The American Academy of Appellate Lawyers filed.
Dec 23 2015	SET FOR ARGUMENT ON Monday, February 29, 2016
Jan 8 2016	Record received from the Supreme Court of Pennsylvania Eastern District. (2 Boxes)
Jan 13 2016	Brief of respondent Pennsylvania filed. (Distributed)
Jan 15 2016	CIRCULATED.
Jan 21 2016	Brief amici curiae of Former Appellate Court Jurists filed. (Distributed)
Feb 11 2016	Record received from the Supreme Court of Pennsylvania. (2 Boxes)
Feb 12 2016	Reply of petitioner Terrance Williams filed. (Distributed)
Feb 29 2016	Argued. For petitioner: Stuart B. Lev, Assistant Federal Defender, Philadelphia, Pa. For respondent: Ronald Eisenberg, Deputy District Attorney, Philadelphia, Pa.

ORIGINAL

OCTOBER TERM 2014

15-5040

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE WILLIAMS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Supreme Court, U.S.
FILED
JUN 12 2015
OFFICE OF THE CLERK

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

CAPITAL CASE
PETITION FOR WRIT OF CERTIORARI

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Dated: June 12, 2015

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CAPITAL CASE
QUESTIONS PRESENTED

1. In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009), this Court held that due process requires an "objective" inquiry into judicial bias. The question presented is:

   Are the Eighth and Fourteenth Amendments violated where the presiding Chief Justice of a State Supreme Court declines to recuse himself in a capital case where he had personally approved the decision to pursue capital punishment against Petitioner in his prior capacity as elected District Attorney and continued to head the District Attorney's Office that defended the death verdict on appeal; where, in his State Supreme Court election campaign, the Chief Justice expressed strong support for capital punishment, with reference to the number of defendants he had "sent" to death row, including Petitioner; and where he then, as Chief Justice, reviewed a ruling by the state post-conviction court that his office committed prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963), when it prosecuted and sought death against Petitioner?

2. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court left open the question whether the Constitution is violated by the bias, appearance of bias, or potential bias of one member of a multimember tribunal where that member did not cast the deciding vote. The circuits and states remain split on that question. The question presented is:

   Are the Eighth and Fourteenth Amendments violated by the participation of a potentially biased jurist on a multimember tribunal deciding a capital case, regardless of whether his vote is ultimately decisive?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Terrance Williams, respectfully prays that a writ of certiorari issue to review the October 1, 2012 denial of Mr. Williams's motion to recuse the Chief Justice of the Pennsylvania Supreme Court and the judgment of the Pennsylvania Supreme Court entered on December 15, 2014, reversing the lower court's grant of a new penalty phase, reinstating Petitioner's sentence of death, and vacating Petitioner's stay of execution.

OPINIONS BELOW

On September 28, 2012, the Philadelphia Court of Common Pleas issued an order granting post-conviction sentencing relief and a stay of execution based upon the Commonwealth's violations of the rule set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Order (Sept. 28, 2012) (A-109).[1] The Commonwealth filed an emergency application with the Pennsylvania Supreme Court to review the order staying Mr. Williams's execution, which the court denied. Order (Oct. 3, 2012) (A-107).

On October 1, 2012, Petitioner filed a motion to recuse Chief Justice Ronald Castille of the Pennsylvania Supreme Court and a request that he refer the recusal motion to the full court if he declined to recuse himself. Chief Justice Castille issued an order on the same day, denying Petitioner's motion to recuse, as well as Petitioner's request that he refer the recusal motion to the full court. Order (Oct. 1, 2012) (A-108).

On December 15, 2014, the Pennsylvania Supreme Court issued an opinion reversing the Philadelphia Court of Common Pleas' grant of post-conviction sentencing relief, vacating the

[1] On November 27, 2012, the court issued a written opinion consistent with its September 28, 2012 ruling from the bench. *Commonwealth v. Williams*, No. CP-51-CR-0823621-1984, (Phila. Ct. Com. Pls. Nov. 27, 2012) (unpublished) (A-39). The court attached a separate "Appendix," which it explicitly made part of the opinion, detailing how the trial prosecutor's testimony before it and conduct during her prosecution of Petitioner led to its determination that she was "less than candid" during her testimony before the court. A-47 n. 23.

stay of execution, and reinstating the sentence of death. *Commonwealth v. Williams*, 105 A.3d 1234, 1236 (Pa. 2014) (A-2). On December 29, 2014, Petitioner filed an application for reargument, which the Pennsylvania Supreme Court denied on February 18, 2015. Order (Feb. 18, 2015) (A-1).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The final judgment of the Pennsylvania Supreme Court was entered on December 15, 2014. The Pennsylvania Supreme Court entered an order denying Petitioner's application for reargument on February 18, 2015. This Court granted Petitioner an extension of time to file a petition for writ of certiorari until June 18, 2015. This petition seeks review of the October 1, 2012 denial of Mr. Williams's recusal motion by Chief Justice Castille, as well as the December 15, 2014 opinion by the full court denying relief and refusing to consider the recusal issue.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

This case cries out for this Court's intervention. The Chief Justice of the Pennsylvania Supreme Court – and former Philadelphia District Attorney, who personally authorized the pursuit of Petitioner's death sentence – refused to recuse himself from his former office's appeal of a post-conviction court's order granting Petitioner a new penalty trial. The post-conviction court had ruled that the Chief Justice's former subordinates played "fast and loose," "[i]ntentionally rooting evidence out of [Petitioner's] prosecution in order to secure a first degree

murder conviction and death penalty sentence," constituting "gamesmanship" and a "penalty phase by ambush." A-105 n.24, A-47 n.23, A-99. The Chief Justice later joined the opinion reversing the grant of relief and vacating the stay of execution.

As the post-conviction court found, the victim in this case was a sexual predator who preyed on underage boys, including Petitioner, beginning when Petitioner was thirteen years old. Based on both documentary evidence and the testimony of the Commonwealth's key witness, Petitioner's co-defendant, the post-conviction court found that the Philadelphia police and trial prosecutor knew that the victim had sexually abused Petitioner; that the police and prosecutor knew that the eighteen-year-old Petitioner acted at the time of the offense in light of the victim's history of sexually abusing him; that the prosecutor coached the co-defendant to testify that the murder took place in the course of a random robbery; and that the police and prosecutor threatened to charge the co-defendant with another unsolved homicide and "sanitized" statements of other witnesses to conceal the victim's history of abusing other teenage boys.

The post-conviction court found that the prosecution had withheld favorable evidence that was material at capital sentencing because "the favorable evidence could reasonably be taken" to put the case "in such a different light as to undermine confidence in the verdict." *Banks v. Dretke*, 540 U.S. 668, 698 (2004); A-89-90. It therefore granted Petitioner sentencing relief and stayed his execution.

The Pennsylvania Supreme Court reversed the ruling of the post-conviction court. Among the members of the State Supreme Court who voted for reversal was Chief Justice Ronald Castille, who was the elected district attorney of Philadelphia at the time of Petitioner's trial, sentencing, and direct appeal, and *personally authorized* the pursuit of a death sentence in this case. Although Chief Justice Castille's vote was not decisive, the lower courts are split on

the issue of whether the presence of a potentially biased jurist on a multimember tribunal violates due process irrespective of the fact that his vote was not dispositive. This case provides an appropriate vehicle to address the important questions presented for review.

STATEMENT OF THE CASE

A. Trial and Direct Appeal Proceedings

Mr. Williams and his co-defendant, Marc Draper, were convicted of murdering and robbing fifty-six-year-old Amos Norwood in the Ivy Hill Cemetery in the Mount Airy neighborhood of Philadelphia on June 11, 1984. Mr. Williams and Mr. Draper beat Mr. Norwood to death with a tire iron and a wrench, and Mr. Williams subsequently returned to the cemetery to douse Mr. Norwood's body with gasoline and light it on fire. Mr. Williams, who was three months past his eighteenth birthday at the time of the offense, was sentenced to death. The trial prosecutor, Andrea Foulkes, argued during her penalty-phase closing argument that Mr. Williams killed Mr. Norwood "for no other reason but that a kind man offered him a ride home." Tr. 2/3/86 at 1873.

At the penalty phase, the Commonwealth presented evidence of Mr. Williams's prior convictions for the 1984 third-degree murder of Herbert Hamilton and the 1982 armed robbery of Don and Hilda Dorfman, both committed when Mr. Williams was a juvenile. Defense counsel presented three witnesses who "testified to Williams' general good nature and athletic success. In something of an understatement, the Pennsylvania Supreme Court found that this rather generic testimony was 'not compelling.'" *Williams v. Beard*, 637 F.3d 195, 228 (3d Cir. 2010) (quoting *Commonwealth v. Williams*, 863 A.2d 505, 520 (Pa. 2004)).

The sentencing jury found two aggravating circumstances – that the murder was committed during a robbery and that Mr. Williams had a significant history of violent felony convictions based on the Dorfman and Hamilton cases. The jury found no mitigating

circumstances and accordingly sentenced Mr. Williams to death, the only available punishment under Pennsylvania law when at least one aggravating circumstance and no mitigating circumstances are found. 42 Pa. Cons. Stat. § 9711(c)(1)(iv). On appeal, the Pennsylvania Supreme Court affirmed Mr. Williams's convictions and death sentence. *Commonwealth v. Williams*, 570 A.2d 75 (Pa. 1990).

B. Initial Post-Conviction Proceedings

Mr. Williams filed a petition under Pennsylvania's Post-Conviction Relief Act. The petition alleged, *inter alia*, that trial counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase of trial.[2] Post-conviction counsel presented evidence at a hearing showing that Mr. Williams was subjected to physical and sexual abuse throughout his youth, including sexual abuse at the hands of the victim, Mr. Norwood, starting at age thirteen. *Williams*, 637 F.3d at 229. The Commonwealth responded to this evidence by attacking the credibility of the post-conviction evidence of Mr. Williams's abusive past and attacking the opinions of his mental health experts as unfounded. *E.g.*, Brief for Appellee at *25, *Commonwealth v. Williams*, 863 A.2d 505 (Pa. 2004) ("The conclusions drawn by the defense experts were completely undermined by their unwavering trust in the self-serving accounts of physical and sexual abuse made by defendant, his family and friends."). The post-conviction court denied relief, and the Pennsylvania Supreme Court affirmed. *Williams*, 863 A.2d at 523. Two justices dissented from the denial of relief. *Id.* at 524, 528-35 (Saylor and Nigro, JJ., dissenting).

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[2] Trial counsel, Nicholas Panarella, Esq., first met Mr. Williams the day before jury selection began. Tr. 1/6/86 at 30. Mr. Panarella was subsequently suspended from the practice of law after pleading guilty to a federal crime. *Office of Disciplinary Counsel v. Panarella*, 849 A.2d 1131, 1131 (Pa. 2004).

Mr. Williams filed a petition for habeas corpus relief in the United States District Court for the Eastern District of Pennsylvania. In federal habeas proceedings, the Commonwealth continued to attack the evidence of abuse and the mental health expert testimony presented in state court on the ground that there was no supporting evidence contemporaneous to the alleged abuse. Response to Penalty-Phase Claims in the Petition for Writ of Habeas Corpus at *89, *Williams v. Beard*, No. 05-cv-3486 (E.D. Pa. May 7, 2007) (disparaging testimony of former teacher James Villareal as being "based on gossip that Norwood molested young boys, which he had allegedly heard even before petitioner murdered Norwood – though he could not identify its source"). The district court found that trial counsel's failure to investigate and present mitigating evidence was deficient performance, but that the state court finding that Mr. Williams was not prejudiced was not unreasonable under the Antiterrorism and Effective Death Penalty Act. *Williams v. Beard*, No. 05-cv-3486, at *86-*97 (E.D. Pa. May 7, 2007) (unpublished).

The Third Circuit assumed, without deciding, that trial counsel's performance was constitutionally deficient, and affirmed the district court's ruling that the state court's no-prejudice ruling was not unreasonable. *Williams*, 637 F.3d at 226, 234-35. In finding that Mr. Williams was not prejudiced by his attorney's performance, the Third Circuit relied heavily on Respondent's attacks on the credibility of the sexual abuse evidence. *Id.* at 230 n.26 ("The Commonwealth assails these allegations of sexual abuse by pointing out that not one of the purported incidents was contemporaneously reported to medical or law enforcement officials. In fact, all of the sexual abuse testimony is based upon statements provided in anticipation of the PCRA hearing. As such, the Commonwealth's point is well taken and we factor it into our prejudice analysis accordingly."). On June 29, 2012, this Court denied Mr. Williams's petition for certiorari review. *Williams v. Wetzel*, 133 S. Ct. 65 (2012).

C. 2012 Post-Conviction Proceedings

On March 9, 2012, Mr. Williams filed another post-conviction petition in the Philadelphia Court of Common Pleas as a result of new information recently revealed by Mr. Draper. Mr. Draper revealed 1) that the Commonwealth had threatened to prosecute him on an unsolved homicide – a fact that was never before disclosed to defense counsel;[3] 2) that he had received a previously undisclosed benefit in the form of a letter the trial prosecutor had promised to write on his behalf to the parole board; 3) that at the Commonwealth's urging he testified falsely at trial that the homicide was motivated by robbery, when it was actually motivated by the childhood sexual abuse Mr. Williams had endured at the hands of Mr. Norwood; and 4) that he had been unwilling previously to disclose any of this information to Mr. Williams's counsel.

On August 8, 2012, Governor Tom Corbett signed a warrant setting Mr. Williams's execution for October 3, 2012. On September 7, 2012, Respondent filed a motion to dismiss the post-conviction petition, arguing, *inter alia*, that it was untimely. The post-conviction court, after holding two oral arguments and requiring an additional proffer from Mr. Williams's counsel, found that Mr. Williams had made a *prima facie* showing of timeliness, and accordingly scheduled an evidentiary hearing. At the evidentiary hearing, which took place on September 20 and 24, 2012, the court heard testimony from Mr. Draper and the trial prosecutor, Ms. Foulkes. During the hearing, additional evidence was uncovered, including previously undisclosed documents from the files of the prosecutor and police.

The hearing focused on Mr. Draper's recent revelation that he informed both police and prosecutors that this case was really about Mr. Williams's sexual "relationship" with the victim,

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[3] Also withheld from the defense was the fact that Mr. Draper was given multiple polygraph examinations by the Commonwealth about the high-profile unsolved murder of a pregnant woman found dead in Philadelphia in 1984. Tr. 9/25/12 at 21-27, 33-36, 109-10; *see also* Post-Conviction Hearing Exhs. P-25, P-26.

rather than a robbery, as he had testified at trial. Mr. Draper testified to that effect at the hearing. Ms. Foulkes, by contrast, repeatedly testified that she never had any inkling that there was any sexual motive to the Norwood killing. Indeed, she specifically testified that she was actively searching for evidence that Mr. Norwood was in a sexual relationship with Mr. Williams, but was unable to find any:

> Like I say, I felt that we had a clearer motive in the Hamilton case[4] and a less clearer [sic] motive to why they did this to Mr. Norwood of all people, but there it was, that's all we had and I would have preferred to have more evidence of the homosexuality if it had existed.

Tr. 9/20/12 (p.m.) at 94.

Among the pieces of newly-revealed evidence, the post-conviction court found as fact that:

- During an initial interview with the police, Commonwealth witness Reverend Charles Poindexter told detectives "that he had 'in fact received a complaint about five years ago from the mother of a 17 year old parishioner that deceased had propositioned the 17 year old for sex.'" A-50 n.31 (quoting June 1984 police activity sheet). Reverend Poindexter also "told police 'in confidence' that Mr. Norwood 'may have been a homosexual.'" *Id.* (quoting June 1984 police activity sheet). The version of this interview "turned over to the defense omitted those portions of Rev. Poindexter's statement *entirely*. A-50-51, A-82-83 (emphasis in original). And "Revered Poindexter's trial testimony was devoid of any reference to Amos Norwood's homosexual ephebophilia.[5]" A-73 n.53.

- The prosecution suppressed exculpatory evidence from Mamie Norwood, the victim's widow. In a June 1984 police activity sheet, Mrs. Norwood told police about an early morning encounter between her husband and a young man, during which her husband claimed he had been abducted but wanted no involvement by the police. In the version of Mrs. Norwood's statement disclosed to the defense, "this entire account was omitted." A-50 n.31.

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[4] Ms. Foulkes testified that she knew of the sexual connection between Mr. Williams and Mr. Hamilton. Tr. 9/20/12 (a.m.) at 18; *see also id.* at 34 (Ms. Foulkes was aware of the sexually-related activities involved in the Hamilton killing); *id.* at 34-35 (Hamilton investigation was sex-related; photos of "nude men [were] all over his place").

[5] An ephebophile is an adult who has a sexual attraction to teens. *See* A-51 n.32.

- The trial prosecutor suppressed her handwritten note memorializing "a conversation in which she learned that [R.H.], a 16-year-old boy in Amos Norwood's church, was groped 'on privates' by Mr. Norwood, and that there were other 'possible incidents.'" at A-50 n.30 (quoting Ms. Foulkes' handwritten note found in prosecutor's trial file). "[N]one of that information was turned over to the defense." A-84.

- The trial prosecutor's withheld handwritten notes indicating that an investigative task in Mr. Williams's case should be undertaken by the "faggot squad," A-56 n.38; a handwritten note that Mr. Draper "knew that Terry made $ by going to bed w/men," *Williams*, 133 S. Ct. at 34-35; "Marc Draper 12-27-85," included the following questions—"did he [Mr. Norwood] know Terry – liked boys," "did he like boys," and "how long had he known Terry," *id.*; and another that demonstrated that she "knew that [a detective]'s investigation produced specific information about Mr. Norwood's sexual involvement with parishioners at his church," A-97 & n.10 ("'D. Bennett talks to Rev. Poindexter who advises of other complaints by parishioners re. dec'd's homosexuality.'").

- The trial prosecutor suppressed her handwritten note that the deceased's wife told her that Mr. Williams was on her porch the day her husband disappeared. A-92.

- The trial prosecutor failed to turn over "a criminal complaint and an arrest warrant for a man named Andre Peterson, for having stolen Amos Norwood's credit cards and forged his signature at a jewelry store on June 13, 1984." A-104. At trial, Ms. Foulkes called the jewelry store clerk who sold jewelry to a man claiming to be Amos Norwood and who testified that it was Mr. Williams who purchased the jewelry. A-105. The court found this to be "yet another instance in which the prosecutor erred on the side of not disclosing evidence that could have been favorable to [Mr. Williams]." *Id.*

After hearing the testimony from Ms. Foulkes and Mr. Draper, and reviewing the police and prosecutorial files, the post-conviction court found that "evidence was plainly suppressed." A-79. Given that the evidence proving the *Brady* violation had been suppressed for nearly three decades by the Philadelphia District Attorney's Office, the post-conviction court found that the petition was timely and properly filed. A-52-62. The post-conviction court went on to state that the "pattern of non-disclosure" "calls into question the trial prosecutor's intent as the architect of the prosecution," and found that Ms. Foulkes engaged in "'gamesmanship,' choosing not to disclose evidence that would have supported the contention that [Mr.Williams] had been the

victim of Mr. Norwood's sexual advances." A-93; *see also* A-92-106 (court's 15-page Appendix solely addressing Ms. Foulkes' "gamesmanship").

The post-conviction court found that, collectively, this undisclosed evidence was material at sentencing, as "[w]ithout this evidence, [Mr. Williams]'s counsel was given a skewed and incomplete picture of the victim which effectively tied his hands while the prosecution elicited testimony at trial about his kind and caring character." A-64. If disclosed, the evidence would have explained "how Norwood's sexual advances amounted to a mitigating 'circumstance of the offense.'" *Id.* "In two different places during her penalty-phase closing argument, the trial prosecutor's comments about appellee's motive for the commission of this crime could have been effectively rebutted – or precluded – had the suppressed evidence been disclosed." A-85, A-87 ("Not only would reasonable defense counsel have directly rebutted the centerpiece of the Commonwealth's penalty-phase closing argument – that [Mr. Williams] killed Amos Norwood 'for no other reason but that a kind man offered him a ride home' – but that attorney would have then explained how the sexual pressure imposed on [Mr. Williams] by Norwood was a 'circumstance of his offense,' as it clouded his judgment." (footnote omitted)).

On the afternoon of September 28, 2012, the same day that the Court of Common Pleas issued its decision from the bench, Respondent sought review of the post-conviction court's ruling through an emergency application to the Pennsylvania Supreme Court to vacate the stay of execution. On October 3, 2012, the Pennsylvania Supreme Court denied Respondent's application for emergency relief. Order (Oct. 3 2012)(A-107). On December 15, 2014, the Pennsylvania Supreme Court, in an opinion joined by Chief Justice Castille, reversed the post-conviction court's grant of penalty-phase relief and lifted the stay of execution. Mr. Williams

filed an application for reargument on December 29, 2014, which the Pennsylvania Supreme Court denied on February 18, 2015.

On January 13, 2015, then-Governor Corbett issued a new warrant for Mr. Williams, setting his execution date for March 4, 2015. On February 13, 2015, Governor Tom Wolf issued a temporary reprieve to Mr. Williams pending the issuance of the legislative task force's report on the state of Pennsylvania's death penalty.[6]

D. Motion to Recuse Chief Justice Castille

Chief Justice Castille was the elected District Attorney for Philadelphia from January 6, 1986, until March 12, 1991. As such, he was the District Attorney throughout the trial, capital sentencing, post-trial, and direct appeal proceedings in this case. The trial prosecutor who was found to have violated her *Brady* obligations was a member of his staff.

Chief Justice Castille *personally authorized* his Office to seek the death penalty in this case. Chief Justice Castille's death penalty authorization is memorialized in a hand-written note on a typed memorandum from Andrea G. Foulkes to Mark Gottlieb, who was then the Chief of the Philadelphia District Attorney's Office's Homicide Unit. A-110-111. The two-page memorandum, dated January 21, 1986, begins with the following sentence: "In the event the jury in the above-referenced case currently on trial, returns a verdict of Murder I, I request that we actively seek the death penalty." A-110. The remainder of the memorandum includes a factual synopsis of the case and a discussion of aggravating and mitigating circumstances from the trial prosecutor's perspective.

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[6] The Philadelphia District Attorney's Office is currently challenging this reprieve in the Pennsylvania Supreme Court. *See* Order (March 3, 2015) (ordering a briefing schedule be set "so that the parties may brief the issue of the propriety of this Court's exercise of King's Bench review as well as the merits of the issues raised").

At the bottom of the memorandum, there are two handwritten notes. The first is from Homicide Chief Mark Gottlieb, and it reads as follows:

> Ron,
> I recommend seeking Death
> M. Gottlieb 1/22/86

A-111. Just below the first notation is a second note, from then-District Attorney Castille, which reads as follows:

> Mark,
> Approved to proceed on the Death Penalty.
> Ronald D. Castille

Id.; *see also* Tr. 9/20/12 (a.m.) at 11 (identification by Ms. Foulkes of Chief Justice Castille's signature on authorization document).

Following Mr. Williams's conviction and death sentence, the Philadelphia District Attorney's Office filed a brief in the Pennsylvania Supreme Court on direct appeal, asking the Court to affirm Mr. Williams's convictions and death sentence. Then-District Attorney Castille is one of the listed counsel for the Commonwealth on the cover and the signature page of the brief. Brief of Appellee, *Commonwealth v. Williams*, 570 A.2d 75 (Pa. 1990).

In the current post-conviction proceedings, evidence was introduced that, on June 23, 1988, trial prosecutor Foulkes wrote a letter to the Pennsylvania Board of Probation and Parole on behalf of co-defendant Draper, the only eyewitness to the murder and the key Commonwealth witness at Mr. Williams's trial. *See* Post-Conviction Hearing Exh. P-15. Although Chief Justice Castille is not the signatory of the letter, the letter is written on the official letterhead of the Philadelphia District Attorney's Office and the sole name on the letterhead is "Ronald D. Castille, District Attorney." *Id.* The letter asks the Board to "consider [Mr. Draper's] cooperation . . . when determining his eligibility for parole or commutation," and notes that this

recommendation from the prosecutor was "the only benefit or promise conveyed to" Mr. Draper in exchange for his testimony against Mr. Williams. *Id.* Despite the existence of this promise to write the parole board, as expressed in the letter, Ms. Foulkes elicited from Mr. Draper at both the Norwood and the Hamilton trials that the full extent of his deal was a plea to second-degree murder and a life sentence. Tr. 9/20/12 (a.m.) at 163. Indeed, at the Hamilton trial Ms. Foulkes specifically elicited from Mr. Draper the fact that he understood that the District Attorney's Office would not write to the parole board on his behalf. *Id.* at 170. The trial prosecutor conceded at the recent post-conviction hearing that this promise to the Commonwealth's witness was not disclosed to the defense at trial and that she "would do it differently today." Tr. 9/20/12 (p.m.) at 25.

In its post-conviction ruling, the Court of Common Pleas cited this undisclosed inducement, among several other items, as evidence demonstrating that the trial prosecutor – an employee of then-District Attorney Castille – suppressed exculpatory evidence, played "fast and loose" with the truth, "had no problem disregarding her ethical obligations," and "took unfair measures to win." Tr. 9/28/12 at 37, 39, 45. Indeed, while the post-conviction court found that the undisclosed deal aspect of Mr. Williams's *Brady* claim was time barred, she specifically noted "that Ms. Foulkes' solicitation of false testimony on direct examination, *and* her failure to correct Draper's false testimony on cross-examination, could have been a potentially viable claim under *Giglio* [*v. United States*, 405 U.S. 150 (1972)], as non-disclosure of a promise made to a witness and subsequent testimony that there was a promise, violates a defendant's due process right to a fair trial if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" A-101 n. 13.

In 1993, Chief Justice Castille campaigned for a position as a Justice on the Pennsylvania Supreme Court. His election campaign stressed his record as Philadelphia's District Attorney. In particular, then-candidate Castille emphasized his pursuit of capital punishment and the fact that, as District Attorney, he "put 45 people on death row," one of whom is Mr. Williams. Examples include:

- "Castille . . . campaigned as the tough-as-nails scourge of criminals . . . . Castille's career as Philadelphia's district attorney, where he built a reputation as a law-and-order crime buster, thrust him in the public eye." Katharine Seelye, "Castille Defeats Nigro for Seat on Supreme Court," PHILADELPHIA INQUIRER, Nov. 3, 1993, *available at* 1993 WLNR 1995447;

- "Castille . . . hopes a law-and-order message, coupled with name recognition in southeastern Pennsylvania, will help him win. . . . 'When I start talking about court reform, people's eyes glaze over,' he said. 'When I tell them about (my) sending criminals to death row or how I fought the Mafia in Philadelphia, then they're interested.'" Frank Reeves, "Castille Preaches Law-and-Order Message to Voters," PITTSBURGH POST-GAZETTE, Oct. 18, 1993, *available at* 1993 WLNR 2134084;

- "Castille and his prosecutors sent 45 people to death row during their tenure, accounting for more than a quarter of the state's death row population. Castille wears the statistic as a badge. And he is running for the high court as if it were exclusively the state's chief criminal court rather than a forum for a broad range of legal issues. . . . Castille talks about bringing a prosecutor's perspective to the bench . . . ." Tim Reeves, "High Court Hopefuls Pressing for Change," PITTSBURGH POST-GAZETTE, Oct. 17, 1993, *available at* 1993 WLNR 2117584;

- "Some candidates . . . skated perilously close to saying how they might be expected to rule on issues that could come before them as judge. Take, for example, Supreme Court Justice-elect Ron Castille – who, while pursuing a job requiring him to hear death-penalty appeals, bragged that he sent 45 people to death row when he was a prosecutor." Lynn A. Marks & Ellen Mattleman Kaplan, "Disorder in the Courts," PITTSBURGH POST-GAZETTE, Nov. 14, 1993, *available at* 1993 WLNR 2150772;

- Candidates "Castille, Nigro and Surrick are aware that special interest groups capable of giving money to control votes would love to hear their positions on gun control, abortion, the death penalty or any hot issue of the day. Under the current [legal] restrictions, Castille says if candidates take positions then they'll have to recuse themselves from any decisions in those cases. 'There's really no solution to it,' Castille says. 'You ask people to vote for you, they want to know where you stand on the death penalty. *I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get*

the hint.'" Lisa Brennan, "State Voters Must Choose Next Supreme Court Member," LEGAL INTELLIGENCER, Oct. 28, 1993 (emphasis added).

Chief Justice Castille was elected and assumed his position on the Pennsylvania Supreme Court in January 1994.

On October 1, 2012, Mr. Williams filed a motion in the Pennsylvania Supreme Court requesting that Chief Justice Castille recuse himself in this case, or, should Chief Justice Castille decline to recuse himself, that the motion be referred to the full court for decision. Later that same day, the Philadelphia District Attorney's Office filed an opposition to Mr. Williams's recusal motion. Still later on October 1, Chief Justice Castille issued a one-sentence order on the motion, which reads as follows: "AND NOW, this 1st day of October, 2012, Respondent's Motion for Recusal is DENIED, as is the request for referral to the full Court." A-108. As noted, *supra*, Chief Justice Castille joined the opinion issued December 15, 2014, reversing the grant of relief.

REASONS FOR GRANTING THE PETITION

I. DUE PROCESS AND THE EIGHTH AMENDMENT REQUIRE THAT A DEATH PENALTY CASE BE DECIDED BY AN IMPARTIAL TRIBUNAL THAT "PRESERVES BOTH THE APPEARANCE AND REALITY OF FAIRNESS."

Chief Justice Castille's refusal to recuse himself from this case violated Mr. Williams's Due Process and Eighth Amendment rights. The "Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *accord In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). This Court has explained that

> [t]his requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law.

Marshall, 446 U.S. at 242 (internal citations omitted). An individual, the Court wrote, must be assured "that the arbiter is not predisposed to find against him." *Id.*

This due process right "has been jealously guarded by this Court" because it "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Id.* (citation and internal quotation marks omitted). This due process requirement takes on even greater significance in a capital case, because of the Eighth Amendment's heightened due process requirements. *E.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

A "fair and impartial tribunal," guaranteed by the Eighth and Fourteenth Amendments, requires not just "an absence of actual bias" – there must not be "even the probability of unfairness" and "'justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S. at 135-36 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). As the Court recently stated in *Caperton v. Massey Coal Co.*, 556 U.S. 868 (2009): "Under our precedents there are objective standards that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

In *Caperton*, the Supreme Court of West Virginia reversed a $50 million trial judgment entered against Massey Coal Company by a vote of 3-2. One of the justices in the majority denied a recusal motion, which was based on the fact that the Massey CEO had contributed $3 million to the justice's election campaign. *Caperton*, 556 U.S. at 872. This Court found that under the circumstances of the case, due process required recusal. *Id.* The Court explained that

> [t]he inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is "likely" to be neutral, or whether there is an unconstitutional "potential for bias."

Id. at 881. With regard to the need for an objective standard, the Court noted that

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

Id. at 883-84 (internal citations omitted). These "objective standards" require recusal when the situation "offer[s] a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused." *Id.* at 878 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)); *id.* at 879 (same).

This Court also acknowledged the problems inherent in a system where "there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias." *Id.* at 885. This Court determined that while the justice "did undertake an extensive search for actual bias," this search is "just one step in the judicial process." *Id.* at 886. The Court held that regardless of whether such an inquiry may "sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," the "failure to consider objective standards requiring recusal is not consistent with the imperatives of due process." *Id.* This is so because "justice must satisfy the appearance of justice." *Offutt*, 348 U.S. at 14.

While the "possible temptation" standard "cannot be defined with precision," *Murchison*, 349 U.S. at 136; *Caperton*, 556 U.S. at 879, it applies here, where Chief Justice Castille was the District Attorney responsible for prosecuting Mr. Williams at trial and on direct appeal; where Chief Justice Castille in a handwritten note personally authorized his Office to

seek the death penalty for Mr. Williams; where Chief Justice Castille's name appears as counsel for the Commonwealth on the direct appeal brief seeking affirmance of Mr. Williams's convictions and death sentence; where the claims presented in this case include claims that the District Attorney's Office, then headed by Chief Justice Castille, violated due process by suppressing mitigating evidence and presenting false and misleading information to the jury; where Chief Justice Castille's name appears as District Attorney on letterhead of a document that is part of the evidence in this case; and where Chief Justice Castille's campaign for judicial office highlighted his obtaining the death penalty in a number of capital cases, including Mr. Williams's case.

Respondent respectfully submits that, considering "all the circumstances of this case, due process requires recusal." *Caperton*, 556 U.S. at 872. Moreover, consideration of some of the circumstances individually highlights why that is so.

Where a judge is part of the "accusatory process," there is cause for recusal. *Murchison*, 349 U.S. at 137; *see also Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363 (7th Cir. 1994) (finding no due process violation where judge was prosecutor in prior unrelated prosecution of defendant but "did not serve dual role of prosecutor and judge" in the prosecution at issue). For example, in *Murchison*, the judge who presided at trial had conducted "'one-man grand jury' proceedings" that resulted in the defendant's indictment. *Id.* at 136. This Court held:

> Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

Id. at 137; *see also Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) (characterizing Murchison's holding by noting that the "judge violated due process by sitting in the criminal trial of defendant whom he had indicted"). This Court noted that in such instances, "it is difficult if

not impossible for a judge to free himself from the influence of what took place" previously, particularly because the judge would be "more familiar with the facts and circumstances in which the charges were rooted than was any other witness." *Murchison*, 349 U.S. at 138.

Here, the due process violation is even clearer than it was in *Murchison*. While the *Murchison* judge returned the indictment while acting as a judge and, thus, did "not likely have all the zeal of a prosecutor," *id.* at 137, then-District Attorney Castille was the prosecutor who personally authorized his Office to seek the death penalty in Terrance Williams's case.

Moreover, Chief Justice Castille then participated in the review of the lower court's denunciation of the actions of those under his supervision, including a finding that his office withheld exculpatory evidence and that "the suppression of this evidence . . . undermines confidence in the jury's death sentence." A-51. It is hard to imagine a claim more susceptible to bias. If ever there was a case that "offer[s] a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused," *Caperton*, 556 U.S. at 878, this is it.

The reports of and quotes from Chief Justice Castille's judicial election campaign further highlight the due process violation. The *Caperton* decision made clear that judicial elections can create circumstances under which due process requires judicial recusal. Justice John Paul Stevens has stated: "A campaign promise to 'be tough on crime,' or to 'enforce the death penalty,' is evidence of bias that should disqualify a candidate from sitting in criminal cases." John Paul Stevens, *Opening Assembly Address, A.B.A. Ann. Meeting*, 12 St. John's J. Legal Comment. 21, 30-31 (1996); *see also* Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 Ariz. L. Rev. 317, 319 (2002) (under due process analysis required by *Caperton*, "tough-on-crime elective judges should recuse

themselves from all criminal cases"). But such a sweeping rule is not necessary here. Chief Justice Castille's campaign was not just "tough on crime" or pro-death penalty, it was based in part on his record as District Attorney of putting people on death row, *one of whom is Mr. Williams*. Under these circumstances, at least, due process counseled in favor of Chief Justice Castille's recusal.

This Court should grant certiorari review and vacate the Pennsylvania Supreme Court's ruling, which violates Mr. Williams's Eighth and Fourteenth Amendment rights.

II. This Court Should Grant Review to Decide the Question It Left Open in *Aetna Life Insurance Co. v. Lavoie*, on which State and Circuit Courts Are Split: Whether Due Process and the Eighth Amendment Require Relief from the Decision of a Panel that Included a Potentially Biased Jurist, Even When the Jurist Did Not Cast the Deciding Vote.

In this case, the judge whose recusal was sought did not cast a decisive vote. This Court has previously noted the open question of whether the bias, appearance of bias, or potential bias of a tribunal member violates due process even where he does not ultimately cast a decisive vote in the matter. The lower courts are split on this important question. Review is of particular importance in this capital case, where the Eighth Amendment's heightened procedural safeguards apply.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the Court noted that it was an open question whether the disqualification of one member of a multi-member tribunal requires a decision to be vacated where the disqualified member did not cast a decisive vote:

> Our prior decisions have not considered the question whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case. . . . [W]e are aware of no case, and none has been called to our attention, permitting a court's decision to stand when a disqualified judge casts the deciding vote. Here Justice Embry's vote was decisive in the 5-to-4 decision and he was the author of the court's opinion. Because of Justice Embry's leading role in the decision under review, we conclude that the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings.

Aetna, 475 U.S. at 827-28 (footnotes omitted). *Caperton* provides an analogous scenario, given that the judge whose qualification to serve was challenged also provided a decisive vote. *Caperton*, 556 U.S. at 874-75.

Justice Brennan, concurring in *Aetna*, explained the impact of each participant in a tribunal's deliberations:

> The description of an opinion as being "for the court" connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

475 U.S. at 830-831 (Brennan, J., concurring).

The circuits remain split on this question. In *Bradshaw v. McCotter*, 796 F.2d 100 (5th Cir. 1986), following *Aetna*, the Fifth Circuit concluded that one of the judges who heard the petitioner's appeal was "disqualified" and that his participation violated due process of law because his name had appeared on the state's brief on appeal as the state prosecuting attorney. Nevertheless, the court denied habeas relief because, "[l]acking a showing in this case that [the judge's] vote was controlling, no prejudice has been shown as the result of the conclusion that he should have recused himself." *Id.* at 101; *see also Richardson v. Quarterman*, 537 F.3d 466, 476-77 (5th Cir. 2008) (applying *Bradshaw*).

Other circuits, however, have found that the participation of a biased member of a tribunal requires relief even if that member does not cast the deciding vote. *See Stivers v. Pierce*, 71 F.3d 732, 746-48 (9th Cir. 1995) ("The plaintiff need not demonstrate that the biased

member's vote was decisive or that his views influenced those of other members. . . . [B]ias on the part of a single member of a tribunal taints the proceedings and violates due process."); *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989) (proceedings "nullified" because "there is no way of knowing" how tainted member's participation affected deliberations); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767-68 (6th Cir. 1966) (result of Commission's decision tainted by participation of biased member although "his vote was not necessary for a majority"); *Berkshire Emps. Ass'n of Berkshire Knitting Mills v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941) ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."); *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 591-92 (D.C. Cir. 1970) (following *Berkshire* and *American Cyanamid*); *cf. Hicks v. City of Watonga*, 942 F.2d 737, 748-49 (10th Cir. 1991) (if one member of tribunal is found to be biased, presence "will have tainted the tribunal and violated [litigant's] due process rights").

State courts, too, have taken a variety of approaches in the wake of *Aetna*. The Texas Supreme Court reviewed the diverging views in *Tesco American, Inc. v. Strong Industries, Inc.*, 221 S.W.3d 550, 554-56 (Tex. 2006), and concluded that "the judgment must be reversed because the opinion on which it was based was authored by a justice who was constitutionally disqualified; it would be stretching the Constitution too far to simply assume she was not involved." *Id.* at 556. Some states, including Pennsylvania, have refused to vacate judgments based on the votes of disqualified judges that are "mere surplusage." *See Goodheart v. Casey*, 565 A.2d 757, 762 (Pa. 1989); *see also State v. Lund*, 718 A.2d 413, 418 (Vt. 1998). Other states, in addition to Texas, hold that a disqualified participant, or at least a disqualified author, requires that the judgment be vacated. *See Nationwide Mut. Ins. Co. v. Clay*, 525 So.2d 1339,

1340-41 (Ala. 1987) (following remand from Supreme Court for further proceedings in light of *Aetna*, Alabama Supreme Court conducts complete rebriefing and redetermination of case with participation of full court of unbiased justices, even though "offending" justice did not cast deciding vote); *Sullivan v. Mayor of Town of Elsmere*, 23 A.3d 128, 136 (Del. 2011) (bias of one member of multimember adjudicatory tribunal deprives party of due process regardless of whether biased member's vote necessary to judgment); *Powell v. Anderson*, 660 N.W.2d 107, 123 (Minn. 2003) (vacating unanimous judgment as disqualification of authoring judge not cured by participation of two qualified judges); *Reg'l Sales Agency, Inc. v. Reichert*, 830 P.2d 252, 253-54 (Utah 1992) (vacating and remanding judgment authored by disqualified judge).[7] At least one state court has held that a disqualified author required recusal of the entire court. *See Johnson v. Sturdivant*, 758 S.W.2d 415, 415-16 (Ark. 1988).

In Mr. Williams's case, the participation of Chief Justice Castille violated due process even though his was not the deciding vote. Not only did his "involvement play[] a part" in the disposition, *see Aetna*, 475 U.S. at 830-31 (Brennan, J., concurring), but he was the Chief Justice and, as such, had the added responsibility and power of assignment. *See* Pa. Sup. Ct. Internal Operating Procedures § 3(B) ("The Chief Justice will assign submitted cases in a rotation schedule by seniority .... Capital PCRA appeals shall be assigned in a separate rotation, to ensure an even distribution of responsibility in those appeals. If it appears that there is an unequal distribution of cases or a delay in deciding cases, the Chief Justice may, as a matter of his or her discretion, alter the assignment order.").

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[7] *See In re Inquiry Concerning Judge*, 81 P.3d 758 (Utah 2003) (declining to follow *Reichert* on other grounds).

If nothing else, Chief Justice Castille's prior participation in Mr. Williams's prosecution does not "satisfy the appearance of justice." *Offut*, 348 U.S. at 14. In addition to the Chief Justice's having already expressed, while District Attorney, his belief that a death sentence is appropriate in this case, Chief Justice Castille was privy to the facts regarding the crime and aggravating and mitigating factors as alleged in the Commonwealth's Memorandum seeking authorization to pursue the death penalty in Mr. Williams's case. A-110-11. This memorandum outlined the instant offense, as well as details of Mr. Williams's prior crimes, including noting a then-current robbery charge, which was subsequently dismissed. The memo noted only the following with regard to mitigating circumstances in the case:

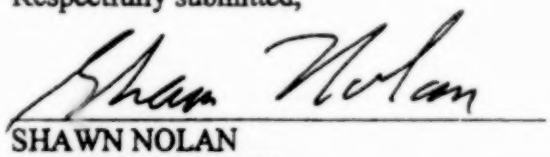
> defendant is 19 years old and went through one year of college at Cheney University. At Germantown High School, he was reputed to be a promising quarterback and his team won the City championship. He has been described by persons who know him as a Jeckyl-Hyde [sic] personality.

A-111. Thus, just as in *Murchison*, Chief Justice Castille was "more familiar with the facts and circumstances in which the charges were rooted" than anyone else on the tribunal. *Murchison*, 349 U.S. at 138. And it was no doubt "difficult if not impossible for [him] to free himself from the influence of what took place" previously. Indeed, the information contained in the Commonwealth's Memorandum seeking authorization is inaccurate and incomplete in light of the new, previously-withheld evidence uncovered during the course of the 2012 evidentiary hearing.

CONCLUSION

WHEREFORE, for all the reasons set forth above, Mr. Williams respectfully requests that the Court issue a writ of certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,



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Dated: June 12, 2015

OCTOBER TERM 2014

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE WILLIAMS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	: No. 688 CAP
Appellant	: Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at
v.	: No. CP-51-CR-0823621-1984, granting a Stay of Execution
TERRANCE WILLIAMS,	: SUBMITTED: September 18, 2013
Appellee	:
COMMONWEALTH OF PENNSYLVANIA,	: No. 669 CAP
Appellant	: Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at
v.	: No. CP-51-CR-0823621-1984
	: SUBMITTED: September 18, 2013
TERRANCE L. WILLIAMS,	:
Appellee	:

ORDER

PER CURIAM

AND NOW, this 18th day of February, 2015, appellee's Application for Reargument is **DENIED**.

opy
18/2015

Watson Jr., Esquire
Prothonotary
e Court of Pennsylvania

[J-82A-2013 and J-82B-2013]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, STEVENS, JJ.

COMMONWEALTH OF PENNSYLVANIA,	No. 668 CAP
Appellant	Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at
v.	No. CP-51-CR-0823621-1984, granting a Stay of Execution
TERRANCE WILLIAMS,	SUBMITTED: September 18, 2013
Appellee	
COMMONWEALTH OF PENNSYLVANIA,	No. 669 CAP
Appellant	Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at
v.	No. CP-51-CR-0823621-1984
	SUBMITTED: September 18, 2013
TERRANCE L. WILLIAMS,	
Appellee	

OPINION

MR. JUSTICE EAKIN **DECIDED: December 15, 2014**

The Commonwealth appeals from the order granting a stay of execution, vacating appellee's death sentence, and awarding a new penalty hearing under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We vacate the stay of execution and the grant of a new penalty phase, and reinstate the sentence of death.

Appellee was sentenced to death after being convicted of the robbery and murder of Amos Norwood February 3, 1986, his second murder conviction. A detailed account of the crime is set forth in our opinion on direct appeal. See Commonwealth v. Williams, 570 A.2d 75, 77-79 (Pa. 1990). Suffice it to say, appellee and his co-conspirator, Marc Draper, took Norwood to a graveyard, tied him with his own clothes, and beat him to death with a tire iron — appellee returned the next day and set fire to the corpse. At trial, appellee testified that Draper and another individual committed the crime; he claimed he was elsewhere at the time and uninvolved. He testified he did not know the victim, had never seen him before, and had no reason to be angry with him or wish to harm him. This Court affirmed the judgment of sentence February 8, 1990, id., at 84, and appellee did not seek certiorari. He filed a timely PCRA petition March 24, 1995.

At the 1998 PCRA hearing, now represented by the Federal Community Defenders Office (FCDO), appellee abandoned his trial testimony and argued Norwood engaged in homosexual acts with him, and as set forth below, presented evidence supporting this claim. The PCRA court denied relief, and this Court affirmed. Commonwealth v. Williams, 863 A.2d 505, 523 (Pa. 2004). Appellee filed a second PCRA petition February 18, 2005, which was dismissed as untimely. This Court affirmed. Commonwealth v. Williams, 909 A.2d 297 (Pa. 2006) (per curiam). Appellee filed a third PCRA petition June 1, 2005, which was dismissed as untimely, and we affirmed. Commonwealth v. Williams, 962 A.2d 609 (Pa. 2009) (per curiam).

While that PCRA appeal was pending before this Court, appellee filed a federal habeas corpus petition December 19, 2005, which was denied. The Third Circuit affirmed. Williams v. Beard, 637 F.3d 195, 238 (3d Cir. 2011). In his federal appeal, appellee contended trial counsel was ineffective for failing to present evidence he was psychologically damaged by years of sexual abuse, which infused him with rage toward

men who made sexual advances toward him; appellee argued Norwood was one of these men and had been sexually abusing him since the age of 13. Appellee petitioned the United States Supreme Court for certiorari, which was denied. Williams v. Wetzel, 133 S. Ct 65 (2012) (per curiam).

On January 9, 2012, the FCDO visited Draper, who was serving a life sentence at SCI-Frackville. That same day, Draper signed an affidavit declaring he told detectives and the prosecution prior to trial that Norwood was a homosexual and was in a relationship with appellee. The affidavit also claimed the prosecution "wanted the motive to be a robbery and kept coming back to that. That's how they wanted me to testify, that it was a robbery." Draper's Affidavit, 1/9/12, at 4. The FCDO revisited Draper March 1, 2012, obtaining another affidavit with similar declarations.

Appellee then filed this facially untimely PCRA petition March 9, 2012, his fourth state petition for collateral review. On July 27, 2012, he filed a "Supplemental Petition for Post Conviction Relief and Notice of Filing Additional Evidence in Support of Stay of Execution," although no execution warrant had been signed. An execution warrant was subsequently issued August 8, 2012, setting the execution for October 3, 2012. Appellee filed a "Renewed Motion for Stay of Execution" August 28, 2012, and the Commonwealth filed a response September 7, 2012. On September 6, 2012, appellee filed a motion for discovery, requesting the production of exculpatory information from the Commonwealth "as well as any reports or notes made concerning Norwood's sexual relationship or sexual abuse of [appellee] or any other child under the age of 18." Appellee's Motion for Discovery, 9/6/12, at 5-6.

On September 10, 2012, the PCRA court heard argument on the pleadings to determine whether the petition warranted an evidentiary hearing. The court gave appellee time to obtain and submit additional information from Draper, which led to his

third affidavit, dated September 11, 2012. On September 14, the court heard additional argument and ordered an evidentiary hearing, which began September 20; only Draper and the trial prosecutor testified. On Saturday, September 22, the court ordered the Commonwealth to produce trial files and Philadelphia Police Department files and allowed both parties to review those files.[1] On September 24, documents from these files were offered and admitted into evidence, and the PCRA court entered 11 exhibits sua sponte. See Exhibit List, 9/20/12. The court then directed appellee to amend his PCRA petition; on September 28, appellee filed an "Amendment and Supplement to Petition for Post-Conviction Relief," requesting relief because the Commonwealth had given "sanitized" witness statements to the defense. The same afternoon, the court ruled there was a Brady[2] violation because that which was missing from original discovery suggested Norwood may have been a "homosexual ephebophiliac." PCRA Court Opinion, 11/27/12, at 12-13 (citations omitted).[3]

The PCRA court also concluded appellee's fourth PCRA petition met the "governmental interference" exception to the PCRA's timeliness requirement, 42 Pa.C.S. § 9545(b)(1)(i),[4] though it did not meet the "newly-discovered evidence" exception, id., §

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[1] The court's order included files for both the Norwood murder and the murder of Herbert Hamilton. Both murders had the same trial prosecutor, the same defendant (appellee), and the same key witness (Draper). In the Hamilton murder, appellee was receiving money from Hamilton in exchange for sex; appellee murdered Hamilton when he threatened to expose this relationship. Although the charge was first degree murder, the jury convicted appellee of third degree murder, about one year before the Norwood trial.

[2] Brady v. Maryland, 373 U.S. 83 (1963).

[3] The PCRA court defined "homosexual ephebophilia" as a psychological term for the attraction to "young men," both adults and adolescents. See id., at 13 n.32.

[4] Subsection (b)(1)(i) provides an untimely PCRA petition falls within an exception if the petitioner proves: "the failure to raise the claim previously was the result of interference by (continued...)

9545(b)(1)(ii).[5] The court ordered a stay of execution pursuant to § 9545(c)(2),[6] finding appellee exceeded the "strong likelihood" threshold and demonstrated actual success on the merits of his claim regarding the penalty phase. The court held the Commonwealth violated Brady and found appellee identified a specific claim, Norwood's homosexual ephebophilia, which he was unable to discover or develop due to interference by the Commonwealth. The interference consisted of withholding or "sanitizing" three specific pieces of evidence: a statement by Norwood's wife, a statement by the pastor of appellee's church, and notes made by the prosecutor.

The first statement involved a story Norwood's wife told police, which was omitted from the 1984 police activity sheet. She said Norwood once woke her at 2 a.m. and asked her for money while a young male stood in the hall outside their bedroom. She saw Norwood load stereo equipment into his car and drive away with the young male. She told police she believed this to be a kidnapping; when Norwood returned home around 9 a.m., he said he was abducted but escaped by using psychology on his captors. When his wife tried to call the police, Norwood asked her to avoid their involvement.

The second statement was from appellee's pastor, who was also a friend of Norwood. The pastor told police Norwood worked with and counseled young males in

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(...continued)
government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States[.]" Id.

[5] Subsection (b)(1)(ii) provides an exception for an untimely PCRA petition if the petitioner proves: "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence[.]" Id.

[6] Subsection (c)(2) states no stay may be issued unless a PCRA petition meeting all requirements of this subchapter of the PCRA has been filed and is pending, and the petitioner makes "a strong showing of likelihood of success on the merits." Id., § 9545(c)(2).

the church for many years. Omitted from the 1984 activity sheet was the pastor's suspicion that Norwood may have been a homosexual, and that five years earlier, the pastor received a complaint from a mother alleging Norwood propositioned her 17-year-old son for sex. The pastor also repeated for police the "kidnapping" story told by Norwood's wife — this was included with the pastor's statements in the 1984 police activity sheet, which had been disclosed to the defense.

The court also found the Commonwealth failed to disclose handwritten notes by the trial prosecutor, purportedly recounting an instance of Norwood's behavior toward a teenage male, which would establish the prosecution's awareness of Norwood's homosexual proclivities. The court stated, had such evidence been disclosed to the defense, trial counsel would have been able to challenge the Commonwealth's sympathetic portrayal of Norwood. The court concluded the inability to portray an unsympathetic victim was enough to undermine one's confidence the jury would have returned the same verdict of death.[7]

Finding appellee exercised due diligence, the court concluded he did not know this evidence existed until his co-conspirator executed an affidavit in January, 2012, declaring a possible motive for the crime, i.e., rage over being sexually abused by Norwood. Appellee timely filed his PCRA petition within 60 days of learning the substance of Draper's affidavit. Furthermore, the court noted appellee could not have known the

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[7] The court also stated the Commonwealth interfered with appellee's Brady claim by "disput[ing] the existence of information in [its] files about [] Norwood's homosexual ephebophilia" when the Commonwealth represented to the 1998 PCRA court that the only evidence involved in the case was appellee's knowledge that Norwood was a homosexual and his plan to extort money from Norwood but mentioned nothing about the additional "homosexual ephebophilia" evidence. PCRA Court Opinion, 11/27/12, at 15-17. The court added a supplemental opinion to its PCRA opinion, describing additional instances that led it to conclude the prosecution exhibited "gamesmanship." See id. app., at 1-15.

Commonwealth interfered with his ability to present evidence of Norwood's homosexual ephebophilia until the underlying evidence was uncovered during the hearing held as a result of Draper's affidavit; therefore, appellee timely filed the amendment and supplement to his PCRA petition in order to particularize his Brady claim just three days after government files were opened. Accordingly, the court concluded appellee met his burden under 42 Pa.C.S. § 9545(b)(1)(i), and subsection (b)(2), so it had jurisdiction to grant relief. Finding appellee established his Brady claim, the court held he was entitled to a new penalty hearing. The court denied relief regarding the guilt phase. The Commonwealth filed this appeal, raising two issues for our review regarding the timeliness of appellee's fourth PCRA petition and the merits of his Brady claim.[8]

Our standard of review of the PCRA court's grant of relief is clear: we examine whether the court's findings are supported by the record and whether its conclusions of law are free from legal error. Commonwealth v. Colavita, 993 A.2d 874, 886 (Pa. 2010). All PCRA petitions, "including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final" unless an exception to timeliness applies. 42 Pa.C.S. § 9545(b)(1). "The PCRA's time restrictions are jurisdictional in nature. Thus, [i]f a PCRA petition is untimely, neither this Court nor the [PCRA] court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal

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[8] The Commonwealth's issues, set forth verbatim, are:

> I. Was [appellee]'s fourth PCRA petition, in which he alleged a violation of Brady[] based on the non-disclosure of information he had known since before trial, untimely?
>
> II. In any event, was [appellee]'s Brady claim meritless where the information in question would not have been reasonably likely to change the outcome, had no apparent exculpatory value, and had been known all along by [him]?

Commonwealth's Brief, at 3.

authority to address the substantive claims." Commonwealth v. Chester, 895 A.2d 520, 522 (Pa. 2006) (first alteration in original) (internal citations and quotation marks omitted). As timeliness is distinct from the merits of the underlying claims, we must first determine whether appellee's PCRA petition was timely filed in order to decide whether this Court has legal authority to address its substantive claims. See Commonwealth v. Stokes, 959 A.2d 306, 310 (Pa. 2008) (consideration of Brady claim separate from consideration of its timeliness).

This, appellee's fourth PCRA petition, was untimely on its face, as it was filed over 20 years after his judgment of sentence became final. The PCRA petitioner has the burden of proving an untimely petition falls within an exception outlined in § 9545(b)(1). See Commonwealth v. Hawkins, 953 A.2d 1248, 1253 (Pa. 2008) ("[I]t is the [petitioner]'s burden to allege and prove that one of the timeliness exceptions applies." (citation omitted)). Furthermore, any PCRA petition filed under a timeliness exception must be filed within 60 days of when the petition could have first been presented. 42 Pa.C.S. § 9545(b)(2). "'[T]he 60-day rule requires a petitioner to plead and prove that the information on which he relies could not have been obtained earlier, despite the exercise of due diligence.'" Commonwealth v. Albrecht, 994 A.2d 1091, 1094 (Pa. 2010) (quoting Stokes, at 310).

Although a Brady violation might fall within the "governmental interference" exception, § 9545(b)(1)(i) nonetheless requires a petitioner to plead and prove: (1) the failure to previously raise the claim was the result of interference by government officials and (2) the information on which he relies could not have been obtained earlier with the exercise of due diligence. Commonwealth v. Abu-Jamal, 941 A.2d 1263, 1268 (Pa. 2008) (citation omitted). The merits of a Brady claim need not be addressed until it is established that the instant petition was timely filed. Stokes, at 310. Thus, the proper

questions for our review are whether the Commonwealth interfered with appellee's ability to present a claim that Norwood was a homosexual with a sexual attraction to teenage males, and whether appellee was duly diligent in obtaining such information.

The PCRA court held it had jurisdiction under the "governmental interference" exception to the PCRA's time-bar, concluding the alleged Brady violations posited by appellee met the requirements of 42 Pa.C.S. § 9545(b)(1)(i). The Commonwealth contends appellee's PCRA petition failed to establish this exception, as appellee would have known well before trial of any sexual relationship or abuse between Norwood and himself. In fact, the Commonwealth argues, if anyone knew about Norwood's homosexual proclivities toward teenage males, it was appellee himself. The Commonwealth points to the evidence of appellee's statements during the murder, taunting Norwood for "liking boys," and appellee's plan to extort Norwood by threatening to expose his homosexual activity.

Further, the Commonwealth contends appellee not only could have presented evidence of ephebophilia much sooner, but points out appellee did present just such a claim during his first PCRA proceedings in 1998, where he offered testimony from several witnesses alleging Norwood sexually abused him. The Commonwealth also posits that appellee's instant PCRA petition admitted he knew about Norwood's homosexual tendencies years before the murder. Since appellee already knew about this alleged material evidence, the Commonwealth contends any "sanitization" of evidence by the prosecution does not amount to a Brady violation. Accordingly, the Commonwealth asserts, appellee did not prove the timeliness exception applies, and the PCRA court was without jurisdiction to rule on appellee's petition, much less grant a stay of execution and a new penalty phase.

The Commonwealth also suggests the PCRA court attempted to circumvent a valid death sentence and undermine the integrity of this Court's ruling in appellee's first PCRA appeal. The Commonwealth refers to the ordering of what amounted to additional discovery to supplement appellee's inadequate petition, the court's lengthy examination of the trial prosecutor after PCRA counsel finished his examination, and the admission of "court exhibits" sua sponte, later basing its "governmental interference" decision on one of its own exhibits. In sum, the Commonwealth contends the PCRA court "went to great lengths to expand the record, to reshape [appellee]'s claim, and to limit the Commonwealth." Commonwealth's Reply to Defendant's Response to Emergency Application to Lift Illegal Stay of Execution, 10/2/12, at 12. The Commonwealth, therefore, requests we vacate the stay of execution and the grant of a new penalty phase.

Appellee argues the PCRA court's timeliness findings were supported by the record and devoid of legal error. While appellee admits he had prior knowledge of Norwood's sexual orientation, he contends such prior knowledge is critically different from evidence of homosexual ephebophilia and sexual abuse of other teenage males. He distinguishes the failure to present the defense of rage at trial, his 1998 ineffectiveness claim, from the inability to present Norwood as unsympathetic, and repeats that knowledge of homosexuality is not the same as knowledge of homosexual ephebophilia, insofar as it relates to the ability to paint an unsympathetic picture of Norwood.

Appellee argues he met § 9545(b)(1)(i)'s exception because the Commonwealth interfered with his ability to proffer this particular Brady claim, and that he exercised due diligence by presenting the claim within 60 days of obtaining the facts on which the claim was based. Further, appellee asserts a PCRA petitioner's previous knowledge of a fact applies only to § 9545(b)(1)(ii)'s newly-discovered evidence exception, not § 9545(b)(1)(i), alleging the Commonwealth is required to disclose evidence in its

possession even if the defense has previous knowledge or other information about that fact, and the failure to disclose such evidence violates Brady, constituting governmental interference with the ability to present a Brady claim.

Our examination of the three omissions alleged leads to the inescapable conclusion that appellee is not entitled to relief. The missing reports were found to be relevant to Norwood's character, but the failure to explore or exploit that character was not a result of governmental interference — there is abundant evidence appellee knew of Norwood's homosexuality and conduct with teenage boys well before trial, sufficient to present him as unsympathetic before the jury. Appellee himself was a teenage male admittedly engaged in homosexual acts with Norwood. Although he denied any involvement in the crime at trial, evidence included his plan to extort Norwood by threating to expose him for being a homosexual, and statements in which Draper and appellee taunted Norwood for "liking boys" while they were beating him. N.T. Trial, 1/22/86, at 667-68; N.T. Trial, 1/23/86, at 813-14; see also N.T. PCRA Hearing, 9/20/12, at 219; N.T. PCRA Hearing Vol. 2, 9/24/12, at 13. Draper testified at trial that appellee told him Norwood was a homosexual. N.T. Trial, 1/23/86, at 814. We agree with the courts that have previously considered appellee's claims based on sexual orientation — there is no reasonable conclusion that the result of a trial for this horrific crime would have been different had the missing information been provided as appellee would have liked.

Further, evidence offered at appellee's first PCRA hearing in 1998 demonstrated the extent of available knowledge of Norwood's sexual appetites. At that proceeding, counsel offered three expert witnesses, all of whom testified appellee and Norwood were in a homosexual relationship in which appellee was abused by Norwood; they suggested the murder was an "enraged killing" in response to the sexual abuse. See N.T. PCRA Hearing, 4/8/98, at 106, 115, 156-59, 186; N.T. PCRA Hearing, 4/9/98, at 360-61, 375-76;

N.T. PCRA Hearing, 4/13/98, at 540, 542-44, 551-54, 569-70. Additionally, appellee's high school teacher, who was also a private psychotherapist, testified Norwood molested young boys, including appellee, and he learned this information from several people in early 1997. N.T. PCRA Hearing, 4/8/98, at 226-33. Appellee's friend, Donald Fisher, who was also in a homosexual relationship with appellee for approximately five years, testified appellee and Norwood began a homosexual relationship when appellee was approximately 15 years old, which lasted a few years, and Norwood was abusive, liked to inflict pain, and enjoyed having sex with teenage males. N.T. PCRA Hearing, 4/13/98, at 597, 602-05, 617. Fisher also testified appellee would engage in homosexual acts with Norwood for money, alcohol, and other gifts. Id., at 617-18. Fisher learned this information not only from observing the relationship between appellee and Norwood but also because appellee told Fisher. Id. Additionally, the defense stated throughout the hearings that its mitigation witnesses were offered to show Norwood molested young males and to demonstrate trial counsel's ineffectiveness in investigating the homosexual relationship between appellee and Norwood and the abuse involved in that relationship. See N.T. PCRA Hearing, 4/8/98, at 235-37; N.T. PCRA Hearing, 4/13/98, at 603.

Appellee's prior knowledge was also evident at his federal habeas corpus proceeding, during which he alleged Norwood was a closeted homosexual from whom he could extort cash by threatening to expose Norwood's secret to his wife. Williams, 637 F.3d at 200. Analyzing the record from appellee's first PCRA proceeding, the Third Circuit noted appellee and Norwood began their homosexual relationship when appellee was approximately 13 years old. Id., at 229. The court stated Norwood was physically abusive toward appellee, once allegedly beating him with a belt. Id., at 229-30. The federal district court also elicited testimony from appellee's first PCRA proceeding showing Norwood was a homosexual with whom appellee had sex in exchange for

money, drugs, and gifts. See Williams v. Beard, 2007 U.S. Dist. LEXIS 41310, at *106 n.32 (E.D. Pa. May 8, 2007).

The PCRA court itself acknowledged appellee's arguments from the 1998 PCRA hearing supported his prior knowledge, stating appellee "elicited evidence from [] Fisher that [] Norwood was very degrading and he liked to have sex with kids. However, the current claim does not rest solely upon that evidence." See N.T. PCRA Hearing, 9/28/12, at 21. The court also noted the defense, at the time of trial, indeed had information suggesting Norwood was a homosexual — a statement from a witness disclosing appellee told him Norwood "'was a homosexual and was the type to pay people.'" Id., at 27-28. Appellee's PCRA counsel also referenced his prior knowledge at the hearings. See N.T. PCRA Hearing, 9/10/12, at 24 ("[W]e tried to present in prior proceedings evidence about the sexual abuse by [] Norwood of [appellee.]").

And quite tellingly, Draper's affidavits established he knew appellee and Norwood were in a homosexual relationship — "[appellee] had also told me that Norwood was gay" and during the murder, "[appellee] was yelling 'so you like boys, so you like boys' as he hit Norwood" — and appellee told Draper the murder was about the homosexual relationship. Draper's Affidavit, 9/11/12, at 2-4. Draper confirmed appellee's prior knowledge of Norwood's homosexual proclivities repeatedly in his PCRA testimony. See N.T. PCRA Hearing, 9/20/12, at 219; N.T. PCRA Hearing Vol. 1, 9/24/12, at 88, 93, 96; N.T. PCRA Hearing Vol. 2, 9/24/12, at 12-13.

The evidence alleged to comprise the Brady violation does not include information unknown to appellee, or information he would have been unable to find on his own. The "kidnapping" story told by Norwood's wife indicates that a probably untruthful story was told to her, but nothing more. The PCRA court apparently read between the lines and presumed the story was a lie to hide Norwood's homosexuality from his wife. And

although this story was omitted from the wife's statements in the 1984 police activity sheet, it was disclosed with the pastor's statements in the same sheet. That is, appellee was already aware of this story, whatever its value, through other means. See Reverend's Disclosed Statement, Exhibit C-2, PCRA Hearing, 9/20/12, at 5. Since appellee had it, the government did not interfere with his ability to obtain it.

The pastor's suggestion that he suspected Norwood may have been a homosexual would hardly have surprised appellee, who knew that for years. The government did not keep appellee from ferreting out the reverend, even if his opinion might have been admissible. The pastor's report that he once received a complaint alleging Norwood propositioned a teenage male would have been equally unsurprising. These allegations confirmed what appellee already knew — Norwood was a homosexual with attraction toward teenage males, like himself.[9] There simply is no surprise in this revelation, no new information or insinuation that only now suggests Norwood might be made to look "unsympathetic."

The third "interference" involves nondisclosure of handwritten notes of the trial prosecutor; the PCRA court concluded they recounted a specific instance of homosexual ephebophilia. In toto, the notes read, "[N]ot true — Mrs. House — son in play — Ronald — 16 yrs.[sic] — touched on privates — I don't do that — nobody wd [sic] have to know — brought boy home [and] asked him not to say anything @ [sic] the — he stopped coming to church — disappeared — never verified it — 29 yrs. [sic] — 1st X [sic] — never heard from others @ [sic] possible incidents." See Exhibit Court-2, PCRA Hearing, 9/20/12, at

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[9] The reverend refused to make these statements in writing but related them to police in confidence. He stated, "[H]e himself handled the matter internally and the complaint never went any further than that." See Police Activity Sheet, Exhibit P-24, PCRA Hearing, 9/20/12.

2. The court sua sponte admitted these cryptic notes into evidence and used them to question the trial prosecutor.[10]

These murky notes, if decipherable with any degree of confidence, do not indicate the origin or veracity of their content; they do not indicate whether the notes were written during a witness interview, much less who was being interviewed. Indeed, they start with the notation "not true." They do not mention Norwood, whose connection to the notes we are asked to insinuate. One could infer they involve the incident omitted from the pastor's statements in the 1984 police activity sheet, where a mother told of Norwood's propositioning her teenage son. However, next to appellee's own evidence at the 1998 hearing, it adds little or nothing whatsoever to the information available and already presented. The ability to pursue the mitigating tactic of making Norwood appear unsympathetic was not created by these notes.

Lastly, we note a measure of bootstrapping in appellee's argument. It is difficult to conclude appellee learned something new from Draper's latest affidavit, as Draper's information was derived from appellee's own statements to Draper prior to and at the time of the murder. Further, Draper's suggestion that appellee was enraged at the time of the murder depends on Norwood's prior abuse of appellee, which necessarily establishes appellee's knowledge of Norwood's proclivities before trial. Thus, any failure to previously raise this claim was not the result of governmental interference. See Commonwealth v. Grant, 813 A.2d 726, 730 (Pa. 2002) ("[N]o Brady violation occurs where parties had equal access to the information or if the defendant knew or could have

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[10] Although the Commonwealth contends the PCRA court violated Pa.R.Crim.P. 902(E)(1) in the "Statement of the Case" section of its brief, see Commonwealth's Brief, at 19, the Commonwealth does not raise a discovery issue on appeal; thus, we will not address discovery matters. See Pa.R.A.P. 302(a).

uncovered such evidence with reasonable diligence." (citation omitted)); see also Commonwealth v. Morris, 822 A.2d 684, 696-97 (Pa. 2003).

Like appellee's failed effort to establish a timeliness exception, his Brady claim provides no grounds for PCRA relief because the claim is inapposite to the necessary materiality inquiry. The United States Supreme Court has never held Brady materiality is measured in terms of "effects on the defense strategy." See Commonwealth v. Weiss, 81 A.3d 767, 810-11 (Pa. 2013) (Castille, C.J., concurring, joined by Eakin, J.). Further, Brady does not permit a defendant to shield himself from his prior perjury at trial. See id., at 811-13.

Appellee's Brady theory suggested that had he received additional information about Norwood's homosexual proclivities, his defense would have learned his actual motive for the murder, i.e., rage over being sexually abused by Norwood, which, in turn, would possibly lead to a new strategy where appellee does not perjure himself and Norwood is portrayed unsympathetically. Yet, at the time of trial, appellee was aware of potential witnesses and information that would establish Norwood's homosexual attraction to teenage males. Appellee could have used his prior knowledge and his counsel's due diligence to obtain additional information and witnesses to support a different trial theory than that presented. He could have argued Norwood's homosexual proclivities developed into sexual abuse, leading to rage and ultimate murder of Norwood. He could also have created a portrait of Norwood consistent with that now proffered. However, appellee chose not to do so.

Instead, appellee perjured himself at trial, testifying he did not know the victim, had never seen him before, took no part in the murder, and had no reason to be angry with him or wish to harm him. The defense he chose to present disclaimed knowledge of Norwood, which is antithetical to what he knew and could have presented — evidence

that showed Norwood as a molester, which may have led to establishing a motive of rage, or evidence allowing him to depict Norwood as an unsavory character and sexual predator. Given the choice of defense, such strategies were not relevant.[11] Given the details of appellee's crime, showing the jury the victim was "unsympathetic" was not a plan that was likely to cause reciprocal sympathy for the man who bludgeoned him and incinerated his body. Regardless, this alleged "sanitized information" claim, coupled with the possible effect on appellee's defense strategy, lacks any basis under Brady, as it is neither exculpatory nor material. See Weiss, at 810-13 (Castille, C.J., concurring, joined by Eakin, J.). In sum, the Commonwealth did not obstruct appellee's ability to present Norwood as unsympathetic. Appellee had prior knowledge of the information on which he based his Brady claim, and could have presented the claim much sooner — prior to trial or at any time over the last 20 years. Because appellee's theory was built on perjury, and the information on which he relied was not exculpatory, the PCRA court erred in finding his claim material under Brady. Accordingly, the record does not support the PCRA court's finding appellee established his burden of proof regarding the "governmental interference" exception. See Abu-Jamal, at 1268 (citation omitted). Because the PCRA court was thus without jurisdiction to consider the merits of this petition, see Hawkins, at 1252 (citations omitted), we vacate the court's order, dismiss this petition as time-barred, and reinstate the judgment of sentence of death. The Prothonotary is directed to transmit the complete record in this case to the Governor pursuant to 42 Pa.C.S. § 9711(i).

Order vacated; petition dismissed; judgment of sentence reinstated.

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[11] Trial counsel indicated at a hearing on appellee's post-sentence motions that he was left with using appellee's youth as a potential mitigating factor — since appellee provided him little, if any, assistance, he was frustrated in efforts to present a compelling group of character witnesses on his behalf. See N.T. Post-Sentence Motions, 4/24/87, at 21-27.

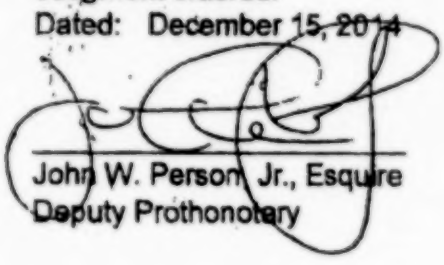
Jurisdiction relinquished.

Mr. Chief Justice Castille and Messrs. Justice Baer and Stevens join the opinion.

Mr. Chief Justice Castille files a concurring opinion.

Mr. Justice Saylor and Madame Justice Todd concur in the result.

Judgment entered:
Dated: December 15, 2014



John W. Person, Jr., Esquire
Deputy Prothonotary

[J-82A-2013 AND J-82B-2013] [MO: Eakin]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 668 CAP
Appellant	:	Appeal from the Order of the Court of Common Pleas of Philadelphia County, Criminal Division, entered on September
v.	:	28, 2012, at No. CP-51-CR-0823621, granting a Stay of Execution
TERRANCE WILLIAMS,	:	
Appellee	:	SUBMITTED: September 18, 2013
COMMONWEALTH OF PENNSYLVANIA,	:	No. 669 CAP
Appellant	:	Appeal from the Order of the Court of Common Pleas of Philadelphia County, Criminal Division, entered on September
v.	:	28, 2012, at No. CP-51-CR-0823621, granting a Stay of Execution
TERRANCE WILLIAMS,	:	
Appellee	:	SUBMITTED: September 18, 2013

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: December 15, 2014**

I join the Majority Opinion. Indeed, in my view, both the Brady[1] claim appellee initially raised, and the Brady claim later uncovered by the PCRA[2] court and upon which

[1] Brady v. Maryland, 373 U.S. 83 (1963).

[2] Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546.

the court granted relief, are time-barred and frivolous. I write separately to expand upon the Majority discussion, and to address the important responsibilities of the PCRA trial courts in serial capital PCRA matters, an issue brought into stark relief by the extraordinary, and unauthorized, measures undertaken by the PCRA court in this case.

Preliminarily, with respect to the latter concern, I note that this is a case involving a **fourth** PCRA petition filed by federal lawyers only after appellee was denied federal *habeas corpus* relief. The fourth petition was time-barred on its face – offering a new, recanting witness (a friend and cohort of appellee) for the same "facts" and theory appellee had long-known and already litigated – and was blatantly frivolous, filed by the FCDO[3] in a transparent effort to induce further delay. Rather than decide the claim actually presented in the efficient manner this sort of last-ditch capital litigation requires, the court below unfortunately strayed from its institutional duties. In the process, the PCRA court: ignored the strictures of PCRA jurisdiction and the appropriate parameters for discovery procedures and evidentiary hearings in serial petition matters; misapprehended what Brady discovery encompasses; misapprehended the substantive law concerning Brady materiality; and, most troubling, lost sight of its role as a neutral judicial officer. As a result, a warrant of execution was enjoined by a trial judge for no valid reason, on the basis of a frivolous fourth PCRA petition, leaving insufficient time for this Court to timely review the judge's injunction of the Governor's warrant.[4]

The PCRA court per the Honorable Teresa Sarmina, justified its actions based on what it viewed as gamesmanship by the Commonwealth in allegedly withholding

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[3] Federal Community Defender's Office.

[4] Appellee cross-appealed the order below, presumably to the extent the PCRA court denied his other claims, but later discontinued that appeal by praecipe. See 673 CAP.

relevant information from appellee. If trial level prosecutorial "gamesmanship" is revealed and is relevant, it obviously warrants notation and condemnation. But, to be relevant in a case involving a fourth PCRA petition raising a Brady claim, the petition would have to be proven timely (to vest jurisdiction), and the uncovered Brady claim would need to possess merit, which both the claim raised in this petition, and the different claim found by the PCRA court, do not. Furthermore, in the Brady arena, before condemning officers of the court, the tribunal should be aware of the substantive status of Brady law both at the relevant time and today.[5] And, just as a preview: Brady does not authorize searching through the government's files – not at trial, not on collateral attack, and especially not on a fourth PCRA petition. This case presents a supervisory issue concerning the manner in which trial courts handle serial petitions in capital cases that I believe requires highlighting and disapproval.

As noted, I will write also to expand upon why the claim raised by appellee, as well as the different claim discovered by the PCRA court, misconceives Brady.

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[5] To the extent the alleged non-disclosures here involved matters found when the PCRA court searched police files, it should be stressed that the investigation and prosecution (murder in 1984; conviction in 1986) preceded, by many years, the U.S. Supreme Court's decision in Kyles v. Whitley, 514 U.S. 419, 437 (1995), which first held that the prosecution's Brady obligation extends to exculpatory materials known to others acting on the relevant government's behalf, including the police. Prior to Kyles, in Pennsylvania, the law was that prosecutors were not responsible for the content in police files. See Commonwealth v. Burke, 781 A.2d 1136 (Pa. 2001) (abrogating prior cases). The consequent distortions in this case are not unusual in this unique area of law where cases continue to be litigated decades after trial, and federal lawyers contend that new rules or innovative rules govern collateral attacks on old cases. Any finding of misconduct respecting this nearly thirty-year old case, then -- and I do not dispute the concern, even if there was zero exculpatory material to support a viable Brady claim – must be tempered by awareness of the governing law at the relevant times, as well as the fact that the Brady focus is not on any evidence, but only on exculpatory evidence and materiality.

I. **The FCDO Agenda as Necessary Prologue**

As I noted in a recent case involving a retroactive Atkins[6] claim raised by the FCDO: The FCDO's significant federal resources, "represented by its cadre of lawyers and roster of experts, are deployed throughout the Commonwealth; individual trial courts, and county prosecutors for that matter, who see only the occasional capital case, may be unaware of the bigger picture, and the strategy at work. This extraordinary shadow capability of the FCDO, and its demonstrated tactics, give me additional pause...." Commonwealth v. Hackett, 99 A.3d 11, 40-41 (Pa. 2014) (Castille, C.J., concurring). It has only recently emerged just how pervasive a presence the FCDO has made itself in Pennsylvania capital cases. Almost invariably without legitimate court appointment, and without any Pennsylvania authority's approval or role of oversight, this "private" group of federal lawyers pursuing an obstructionist anti-death penalty agenda have essentially anointed themselves as a statewide, *de facto* capital defender's office. Common tactics of the FCDO include multiple attempts to delay and obstruct cases, as well as attempts to unsettle and undermine Pennsylvania law. See generally Commonwealth v. Spotz, 99 A.3d 866 (Pa. 2014) (Single Justice Opinion on Post-Decisional Motions by Castille, C.J.) (collecting cases and tactics).

One common tactic is that, immediately after one round of review fails, the FCDO "discovers" a new claim and initiates a new round of delay-inducing review. See, e.g., id.; Commonwealth v. Porter, 35 A.3d 4 (Pa. 2012); Commonwealth v. Abdul-Salaam, 996 A.2d 482 (Pa. 2010). In this case, that is exactly what the FCDO did. Appellee already had a full direct appeal, three rounds of PCRA review and appeal, and a full round of federal *habeas corpus* review and appeal when the FCDO happened upon

[6] Atkins v. Virginia, 536 U.S. 304 (2002).

"new" evidence and filed this fourth PCRA petition which, in fact, merely reiterated the same evidence and a theory it had already litigated and which was found to be meritless. The PCRA court below should have decided the claim actually presented to it, while maintaining a proper perspective. And, it has become apparent that PCRA courts throughout Pennsylvania need to be vigilant and circumspect when it comes to the activities of this particular advocacy group, to ensure that the FCDO does not turn PCRA proceedings, and in particular serial proceedings, into a circus where FCDO lawyers are the ringmasters, with their parrots and puppets as a sideshow.

II. The Brady Issue Raised by the FCDO was Time-Barred and Frivolous

This fourth PCRA petition was filed by the FCDO in March of 2012, immediately after appellee's federal *habeas* attack on his conviction failed. Appellee's final appropriate prospect for relief was through mercy: the clemency process. The FCDO was appointed to represent appellee for purposes of pursuing state clemency. Nevertheless, the FCDO proceeded to file yet another PCRA petition.

The FCDO alleged prosecutorial suppression of information allegedly provided to the police and the prosecutor during witness preparation sessions by appellee's friend and cohort-in-murder Marc Draper – who was convicted for his own role in the murder and is serving life in prison, who testified contrarily at appellee's trial, and has nothing to lose by now lying for his friend – and the Reverend Charles Poindexter. Draper claimed that he had told the arresting officers, as well as the prosecutor, that the victim, Amos Norwood, was a homosexual, that Norwood and appellee were involved in a sexual relationship, and that the murder was about that relationship. What was obfuscated by Draper and the FCDO was that this information could only have been learned through appellee's own communications with Draper, since appellee obviously knew his "true"

motivation; or else it was just Draper's irrelevant opinion. Draper further claimed that police told him to testify that the motive for the murder was robbery. Appellee also included a "declaration" from Poindexter (who had testified for the Commonwealth at the guilt phase of trial), claiming he had learned from police that the victim would sometimes meet gay men in a house or an apartment.

From this information, the FCDO constructed a claim that the Commonwealth suppressed "exculpatory" evidence of the relationship between appellee and the victim and appellee's supposed "true" motivation for the murder – again, as if appellee himself did not know his own true motivation – which could have been used to rebut elements of first-degree murder and to undermine the death penalty. The argument was akin to a "bad faith" argument, *i.e.*, the Commonwealth had argued that a churchgoing man was robbed and murdered by appellee and Draper, despite knowing that appellee may have had a different relationship with the victim, and a different motivation that he was keeping to himself.

As the Majority explains, the information alleged in this fourth petition not only was obviously known to appellee, but it also was irrelevant to the trial proceedings (the focus of Brady) because the defense – offered through appellee's testimony – was one of innocence and non-involvement. In short, appellee chose to lie. In addition, the Draper and Poindexter statements – conveniently secured by the FCDO only after losing in federal court – rehashed the same information concerning the victim's character and appellee's "true" motivation for the murder already litigated in the first PCRA proceeding. Thus, the FCDO's last-ditch Brady claim consisted of evidence already known to appellee, a claim already litigated by appellee, and a contrary defense theory springing from an admission that appellee perjured himself at trial. The PCRA court should have taken the frivolous issue as the FCDO presented it and dismissed it

as time-barred. The court inexplicably did not; and instead, the frivolous issue now before this Court is a different Brady claim never raised by appellee until prompted to do so by the PCRA court, after the issue was uncovered by the PCRA court itself only by losing sight of fundamental precepts, including its role as neutral arbiter.

III. PCRA Court's "Discovery"

A PCRA court is without jurisdiction when a serial petition is filed (assuming it is filed more than one year from the date the judgment of sentence became final, as it was here) unless it falls within one of three limited exceptions. 42 Pa.C.S. § 9545. In all PCRA petitions, the burden is on the PCRA petitioner to establish an exception to the one-year jurisdictional time-bar, before the court can act. Moreover, the rules governing discovery in PCRA matters explicitly state that no discovery is permitted for first counseled petitions except "upon leave of court after a showing of good cause," Pa.R.Crim.P. 902(E)(2); while in serial cases such as this one, discovery is not permitted "except upon leave of court after a showing of exceptional circumstances." Rule 902(E)(1). These are this Court's Rules: not niceties to be done away with perhaps because of some unease with capital cases.

Nothing in the Rules authorizes a PCRA court to demand the government's thirty-year-old files and for the court itself to go searching for information and new claims – all without jurisdiction being established. This is true whether the case is a capital case or not – the difference of a death sentence does not create jurisdiction, or derivative power, where it does not exist.

These Rules are neither arbitrary nor mere aspirations. The PCRA Rules square with Brady, which does not command an open-file policy, or a "sporting system" of discovery. See Brady, 373 U.S. at 90-91. Thus, even where, unlike here, serial petition

jurisdiction is established and the petitioner demonstrates exceptional circumstances to warrant some form of discovery, such orders do not properly encompass simply seizing and rummaging about in the government's files.

> [T]he [U.S. Supreme] Court has noted that the duty imposed upon the prosecution under Brady is a limited one. See, e.g., Weatherford v. Bursey, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977) ("[t]here is no general constitutional right to discovery in a criminal case, and Brady did not create one"); see also Kyles, 514 U.S. at 436–37, 115 S.Ct. at 1567 ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.... We have never held that the Constitution demands an open file policy ...."). This Court has also recognized Brady's limited requirements, and has noted that Brady does not grant a criminal defendant unfettered access to the Commonwealth's files. See Commonwealth v. Edmiston, 578 Pa. 284, 851 A.2d 883, 887 n. 3 (2004) (defendant has no general right under the Constitution or *Brady* to search Commonwealth files); Commonwealth v. Williams, 557 Pa. 207, 732 A.2d 1167, 1176 (1999) ("[T]he Commonwealth is, in the first instance, the judge of what information must be disclosed.... 'Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance.' ") (quoting Pennsylvania v. Ritchie, 480 U.S. 39, 59, 107 S.Ct. 989, 1002, 94 L.Ed.2d 40 (1987)); Commonwealth v. Counterman, 553 Pa. 370, 719 A.2d 284, 297 (1998), cert. denied, 528 U.S. 836, 120 S.Ct. 97, 145 L.Ed.2d 82 (1999) (Brady is not a general rule of discovery in criminal cases).

Commonwealth v. Lambert, 884 A.2d 848, 854 (Pa. 2005).

This Court's Rules, likewise and for similar good reason, do not empower a PCRA judge to hold evidentiary hearings in a serial petition case in advance of a demonstration of jurisdiction. Appellee already had five full rounds of review. Hearings are appropriate – after jurisdiction is established – only if there has already been an actual demonstration of a genuine issue concerning any material fact. See Pa.R.Crim.P 908(A)(2), 909(b)(2). A new and different Brady claim discovered by the PCRA judge's own unauthorized, and unlimited, "investigation" – conducted after a serial PCRA petition is filed and not yet assessed for jurisdiction – cannot operate to

render the petition timely when filed. Likewise, information obtained from the government's files after the PCRA court improperly ordered seizure of the information without foundation cannot retroactively operate to validate the improper serial petition "discovery" order (or "seizure" order, in this case) in the first instance.

During one of the earliest hearings after an execution date was set in this matter, the PCRA court recognized that Draper's affidavit was insufficient to warrant an evidentiary hearing. Nevertheless, the court essentially directed appellee to procure a third affidavit from Draper to see whether appellee could establish a strong showing of success on the merits which, in the mind of the court, was necessary in order to warrant an evidentiary hearing with a death warrant pending. N.T., 9/10/12, at 86-87. Following submission of the third affidavit, the court then ordered an evidentiary hearing to receive testimony from Draper and the trial prosecutor (who was no longer with the District Attorney's Office). Prior to this hearing, the court entered an order prohibiting the parties from communicating about the case with Draper or the trial prosecutor and further ordered the trial prosecutor to bring any documents in her possession related to the case to the evidentiary hearing. The court then ordered the prosecutor's office to give access to the case files to the trial prosecutor, via an e-mail the judge sent to the parties.

A subsequent e-mail from the court took the even more lawless step of essentially opening the prosecutor's files to appellee's counsel, as the judge directed that appellee was permitted to review any of the documents reviewed by the trial prosecutor. Then, in another e-mail sent on Saturday, September 22, 2012, the court's clerk directed the Commonwealth to secure the police department's homicide files in

this case and the Herbert Hamilton murder case[7] because "the judge wants to review everything in the possession of the police department about these two cases." See Attachment to "Commonwealth's Motion to Complete the Record," filed 10/26/12. The PCRA court's examination of these files provided the basis for the examination of the witnesses at the evidentiary hearing, including an extended cross-examination by Judge Sarmina herself.

Ignoring the jurisdictional time-bar and the rules of procedure, and all in a truncated death warrant time-frame leaving little time for appellate review in two court systems, the PCRA court essentially seized the files of the Commonwealth and the police for no legitimate reason (and certainly not based upon the required actual defense showing of exceptional circumstances), independently reviewed the materials, and then used that which was uncovered by the court to examine witnesses at an evidentiary hearing again scheduled for no legitimate reason. The court also entered some of the documents into the record on its own without any motion or prompting by appellee. Only thereafter, during the September 25th hearing, did appellee ask permission to amend the fourth PCRA petition to include the new allegations raised by the documents the judge had found, and the court immediately granted the request, reasoning that Chapter 900 of the Rules of Criminal Procedure – the same chapter containing the Rules respecting discovery and evidentiary hearings that were of no concern to the judge – supposedly indicated that there should be a liberal ability to amend, "even if it is at this late stage." N.T., 9/25/12, at 76.

Unfortunately, the PCRA court apparently allowed itself to be compromised by the fact that this was a capital case that was proceeding under an execution warrant.

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[7] Herbert Hamilton, another older man with whom appellee had a sexual relationship, was the first person appellee murdered.

But, that is what happens, thirty years on, after a condemned capital petitioner has already exhausted five full rounds of review, and his federal lawyers try another longshot at delaying the case. Also, in taking these extreme, activist measures, the court cited a belief – proper enough in some spheres, and thus recognized in specific doctrines – that "death is different." The judge added: "This is not any regular, old PCRA, including in a non-capital case." N.T., 9/14/12, at 69. No, it was not an ordinary case, but not for the reason cited by the court: it was a last-ditch fourth state collateral petition, filed by the FCDO no less, after federal review had concluded, rehashing old claims that just happened to involve a two-time murderer finally facing the execution of his sentence.

This case demonstrates that the "difference of death" when reduced to an unmoored slogan causes mischief. The slogan does not create PCRA jurisdiction, and jurisdiction must be proven before the PCRA court can act. The difference of death is not a ground for ignoring this Court's Rules of Procedure, which specifically apply to – and in many instances exist specifically because of – capital cases. The difference of death also does not alter a trial court's crucial role as a neutral arbiter to pass upon the timeliness, and if timely, the merits of the claims that a serial PCRA petition actually raises. Five Ninth Circuit jurists recently commented on the abuse of the "death is different" notion in a dissent, explaining that the rule of law must be paramount:

> Whatever they are, motivations are beside the point. We should follow the law. Instead, we lay flame to orderly case-processing rules, comity due to state court judgments, and principles of finality. "[Fire's] real beauty is that it destroys responsibility and consequences. A problem gets too burdensome, then into the fire with it." Ray Bradbury, *Farenheit 451* 109 (Simon & Schuster 2012). We should be more cautious.

Henry v. Ryan, 766 F.3d 1059, 1072 (9th Cir. 2014) (Tallman, J., dissenting, joined by O'Scannlain, Callahan, Bea, & Ikuta) (dissenting from grant of *en banc* review in case

where time for Circuit reargument had long passed, and U.S. Supreme Court had already denied *certiorari*). Ultimately, the PCRA court here lost sight of its limited, albeit crucial, role.

As a consequence, the PCRA court steered its own course away from the actual Brady claim presented in this time-barred serial petition; and the Brady claim forming the basis for the penalty phase relief the PCRA court granted could not retroactively establish jurisdiction so as to justify the lawless discovery and evidentiary hearing that had already occurred per the court's *sua sponte* directives. To make matters even worse, the claim the court discovered on its own was simply a different, frivolous Brady claim.

IV. Brady Law

The 1984 murder here was appellee's second murder. His first murder victim, Herbert Hamilton, was another man with whom he had a sexual relationship, a relationship appellee denied. At the trial in this case, appellee testified to his absolute innocence, claiming he did not even know the victim. As all now agree, this sworn testimony was a lie since appellee not only knew the victim, but he had an ongoing homosexual relationship with him. But, it is the story appellee elected to tell the jury in the hopes, however desperate, of an acquittal. It is not the first time a criminal defense was premised upon a lie, but it is a defendant's right to pursue the defense he chooses (even if it risks a subsequent perjury prosecution, which is hardly a disincentive to a serial murderer in appellee's circumstances).

The new Brady claim discovered by the PCRA court's efforts involved "dirt" about the victim: that he was a "homosexual ephebophiliac" who had sexual encounters with male teenagers. Specifically, as explained by the Majority, the claim was that

information that the victim was a homosexual ephebophiliac could have been employed to paint an unsympathetic picture of the victim at the penalty phase. Majority Slip op. at 17. Nothing in the death penalty statute, however, makes slander about a victim a relevant consideration. The death penalty statute does not recognize an exception if the murder victim was a sexual deviant, or even a convicted sex offender; and smearing the victim's character would not rebut the two aggravators the jury found: the commission of a felony (robbery) along with the murder, and the significant history of violent felony convictions, which included the murder of Hamilton, and a Christmas Eve, home invasion gunpoint robbery of an older couple – where appellee pressed a rifle to the woman's neck and threatened to blow "her fucking head" off, and then fired multiple shots into the wall. Nor would such evidence be probative of a mitigating circumstance. See Commonwealth v. May, 898 A.2d 559, 566 (Pa. 2006) (testimony designed only to smear murder victim's character not relevant; noting as "apt" trial court's analysis that: "it's just as illegal to kill the devil as it is to kill a saint"). And, when the defendant takes the stand and swears he had nothing to do with killing the victim, and did not even know him, it clearly limits his penalty phase options respecting mitigation arising from "the circumstances of the offense."

The linking assumption depends upon a pet Brady theory the FCDO has been raising recently, *i.e.*, that Brady is violated by non-disclosures which, though involving information neither exculpatory nor material in and of itself, in hindsight might have been used by trial counsel to keep the defendant from testifying and perjuring himself, thereby altering the focus of the necessary Brady materiality inquiry. See Commonwealth v. Weiss, 81 A.3d 767 (Pa. 2013) (Castille, C.J., concurring, joined by Eakin J.) (further discussed and quoted *infra*). In the iteration posed here, the theory goes something like this: had additional information about the victim been disclosed, the

defense would have learned appellee's "real" motive for murder (again, as if appellee did not know his motive), and perhaps trial counsel could have convinced appellee not to take the stand and lie, thus opening the door to an attack-the-victim defense at the penalty phase. Even setting aside the irrelevancy of bad character information about a murder victim, Brady does not embrace this sort of perversity, a theory that rewards the defendant's trial perjury.

Furthermore, even if the PCRA court found something "unsporting" about the government's conduct revealed in the government's files that the court seized, and even if evidence of poor "sportsmanship" in discovery angered the judge, that is not the basis for a Brady claim. What matters is the legal point, made by the Majority, that there was nothing exculpatory or material in this information.[8] Appellee always knew of the

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[8] In concisely summarizing why the PCRA court erred in finding that appellee's reconfigured-by-the-PCRA-court claim did not qualify under the governmental interference exception, based upon information appellee himself had known before trial, and supplemental information which he secured for use in a prior PCRA petition over fifteen years before, the Commonwealth succinctly explains:

> When, at trial, defendant considered it in his interest to deny any sexual relationship with his victims so as to distance himself from their deaths, he made the strategic decision, **independent of any information in the government's possession**, to do so. And when that did not work, and he decided it was in his interest to instead claim in his first PCRA petition that he killed the victims [both here and in the Hamilton case] because they sexually abused him, he had no difficulty marshalling evidence **outside the government's possession** to support that version of events. At no point was his ability to defend against the charges, or to present any claim, constrained by the actions of the trial prosecutor or any other government official. Consequently, his untimely fourth PCRA petition, which he filed more than twenty years after his judgments of sentence became final, did not satisfy the governmental-interference exception to the one-year filing deadline. His petition was time-barred, and the PCRA court's order purporting to grant relief was a jurisdictional nullity that should be reversed.

(...continued)

victim's supposed proclivities; again, the current claim is just another version of the claim raised and litigated by the FCDO fifteen years ago. Nevertheless, the PCRA court drew a legal conclusion that the evidence respecting the victim was subject to Brady disclosure before the 1986 trial; and, if only the prosecution had disclosed non-exculpatory information already known to appellee about the victim's character, it may have changed appellee's guilt phase decision to testify; and, the theory goes on in speculation, may have altered the outcome of the penalty proceeding. See Appellee's Brief, at 29-30 (quoting PCRA court opinion).[9] The notion that this sort of evidence, in the context of a trial where appellee testified and denied any involvement, warrants Brady-based penalty phase relief, is ludicrous.

As the Majority notes, the U.S. Supreme Court has never held that Brady materiality is measured by the FCDO's effect-on-the-defense-trial-strategy theory; and a serial collateral attack is not the proper place to establish such constitutionally

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(continued...)
Commonwealth's Brief as Appellant, 34 (emphasis original).

[9] In point of fact, appellee never so much as offered to prove that, but for the alleged non-disclosure, he would have presented evidence detailing his ongoing, prior sexual relationship with the victim, and then claimed that the relationship was why he murdered the victim. Furthermore, the decision to testify was defendant's alone; his trial counsel's role was limited to consultation. In this regard, it is notable that, in the prior PCRA proceeding, where appellee litigated the same basic claim, trial counsel testified that he had negotiated a plea deal where appellee would receive life in prison – the best possible circumstance where appellee faced the death penalty, had substantial aggravators, and the fact of the robbery meant that his best, realistic prospect was a conviction for second-degree murder, which carries a mandatory life sentence. Counsel consulted with appellee. But, counsel testified, appellee was adamant that he was not willing to exchange his prayer of a hope for an outright acquittal for a term of life imprisonment. Appellee told counsel he would rather be executed than spend his life in jail. No claim but innocence could lead to acquittal, and appellee decided to go that route by then perjuring himself.

innovative new rules. Moreover, it would be absurd to grant Brady relief upon a claim that would involve rewarding a defendant for his own deliberate perjury at trial. I explained the error in this theory in my Concurring Opinion in Weiss:

> The Brady analysis argued by appellant is erroneous for several reasons. First, the U.S. Supreme Court has never embraced his interpretation. Indeed, appellant's claim to the contrary is premised upon a mischaracterization of United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Appellant states the following proposition as if it were black-letter law: "The proper Brady inquiry asks what 'course that the defense and the trial would have taken had the defense not been misled' and what impact the misconduct had on 'the preparation or presentation of the defendant's case.' Bagley, 473 U.S. at 683, 105 S.Ct. 3375." ... From his assertion that mere effects upon defense preparation, rather than hard evidence, is the measure of Brady materiality, appellant argues his more radical extended rule that he may shield himself from his own prior testimony.
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> However, Bagley supports neither appellant's "defense effects" root rule, nor his testimonial immunity extension of the rule. Appellant's [FCDO] counsel neglect to note that the Bagley language they cite and quote as governing black-letter law in fact represented the views of only two Justices in Bagley. It is not governing law. I examined and explained the non-precedential effect of this language at some length in my concurring opinion in Commonwealth v. Willis, 616 Pa. 48, 46 A.3d 648 (2012), a direct appeal case. See id. at 674-84 (Castille, C.J., concurring, joined by Eakin and McCaffery, JJ.) (addressing Court's erroneous apprehension of Brady materiality in Commonwealth v. Green, 640 A.2d 1242, 1245 (Pa. 1994)).
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> Moreover, nothing in the logic of Brady materiality suggests a design to shield a defendant from his prior testimony or perjury. The test for Brady materiality is the same as the test for Strickland [v. Washington, 466 U.S. 668 (1984)] prejudice: whether there is a reasonable probability that the outcome of the proceeding would have been different. See Kyles v. Whitley, 514 U.S. 419, 433-35, 115 S.Ct. 1555, 131 L.Ed.2d 490 (U.S. 1995) (noting that Bagley adopted Strickland formulation for Brady claims). The test, whether for Brady or Strickland, looks to the proceeding that actually occurred and attempts to assess its underlying fairness. See id. at 451, 115 S.Ct. 1555; see also Bagley, 473 U.S. at 678, 105 S.Ct. 3375. The High Court has never held that courts, charged with assessing

Brady materiality by re-examining the trial that occurred in light of previously suppressed evidence, are obliged to diminish the record at that trial. Accordingly, appellant's theory is a non-starter. The expansion, if there is to be one, should come from the High Court.

Second and relatedly, this is a PCRA appeal. An assessment of the fairness of appellant's trial – whether he poses a Brady claim, a Strickland claim, or any other claim – is not measured by minority views in prior decisions or by hopeful predictions of where federal decisional law might someday go; it is measured by the existing law that governs. The only federal decisional law that governs in Pennsylvania is that commanded by the U.S. Supreme Court. ... And, errors in such predictions [of where the law might develop] favoring the defense run the risk of arbitrarily releasing murderers.

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Finally, I believe it is extremely unlikely that the U.S. Supreme Court would adopt a Brady materiality extension ... which would immunize a defendant against the effects of his own trial testimony, much less his own false trial testimony. To borrow from the Strickland jurisprudence from which Brady materiality derives:

> It is true that while the Strickland test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as Strickland itself explained, there are a few situations in which prejudice may be presumed.... And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate "prejudice." Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. Nix v. Whiteside, 475 U.S. 157, 175-176, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).
>
> Similarly, in [Lockhart v. Fretwell, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)], we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate

> "prejudice" contemplated by our opinion in Strickland.... Because the ineffectiveness of Fretwell's counsel had not deprived him of any substantive or procedural right to which the law entitled him, we held that his claim did not satisfy the "prejudice" component of the Strickland test.
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> Williams v. Taylor, 529 U.S. 362, 391-93, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (citations and footnotes omitted). Cf. Commonwealth v. Cox, 581 Pa. 107, 863 A.2d 536, 556-57 (2004) (Castille, J., concurring) (strong argument to be made that heightened prejudice standard under Lockhart should be applied to ineffectiveness claims with "fundamental substantive issues that would have to be resolved in defendant's favor before relief could be granted"); United States v. Day, 285 F.3d 1167, 1171 (9th Cir. 2002) ("Because a defendant does not have a 'right' to commit perjury without suffering the consequences, the fact that counsel's ineffectiveness gave [defendant] an opportunity to commit perjury does not constitute deprivation of a right; accordingly, this portion of the sentence does not satisfy the prejudice component of Strickland."). Again, in explicating both Brady and Strickland, the High Court has stressed the overriding concern of whether the defendant has received a fair trial. Fairness works two ways, the High Court teaches. When the defendant takes the stand and elects to testify, and then testifies absurdly or untruthfully, I doubt that the U.S. Supreme Court would hold that Brady requires courts to pretend that his testimony never existed.

Weiss, 81 A.3d at 810-13 (Castille, C.J., concurring, joined by Eakin, J.) (footnotes omitted).

For these specific reasons, in addition to those set forth by the Majority on the time-bar and the merits, the new Brady claim fashioned by the PCRA court here provides no grounds for serial petition jurisdiction, much less PCRA relief.

V. Conclusion

The FCDO's agenda and tactics by now should be predictable: this group has been aptly described, by a federal judge, as "gaming a system and erecting roadblocks in aid of a singular goal -- keeping [the defendant] from being put to death." See Abdul Salaam v. Beard, 16 F. Supp. 3d 420, 511 (M.D. Pa. 2014). That gaming is bad

enough; but, what is disheartening here is that the PCRA court became unmoored from its lawful duty. Trial courts faced with serial petitions in capital cases must be vigilant to protect against frivolous claims, and must be aware of their own actual duties; the PCRA judge here was not.

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PHILADELPHIA COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	CP-51-CR-0823621-1984
v.	:	Supreme Court Docket No.: 669 CAP
TERRANCE WILLIAMS	:	
Sarmina, J. November 27, 2012	:	

OPINION

PROCEDURAL HISTORY

On February 3, 1986, a jury convicted Terrance Williams (appellee) of first-degree murder (H-1), robbery (F-1) and criminal conspiracy (F-1) in the killing of Amos Norwood (victim).[1] After a penalty hearing that same day, the jury found two aggravating circumstances,[2] no mitigating circumstances,[3] and returned a verdict of death on February 4, 1986.[4] Appellee filed post-trial motions, which were denied in a formal opinion by the

[1] 18 Pa.C.S. §§ 2502(a), 3701, and 903, respectively.

[2] The two aggravating circumstances found by the jury were that appellee committed the killing while perpetrating a felony and that he had a significant history of felony convictions involving the use or threat of violence to the person. 42 Pa.C.S. §§ 9711(d)(6) and 9711(d)(9), respectively. The Commonwealth introduced evidence of appellee's convictions for burglarizing the home of Hilda and Donald Dorfman, and killing Herbert Hamilton, for which he was tried and convicted of third degree murder in February 1985.

[3] Appellee's trial counsel, Nicholas Panarella, Esquire, presented mitigating evidence of appellee's youth at the time of the crime and his character and record. 42 Pa.C.S. §§ 9711(e)(4); 9711(e)(8). Mr. Panarella did not make any argument with respect to the victim at the penalty phase. Notes of Testimony (N.T.) 2/3/1986 at 1877-81.

[4] On July 1, 1987, appellee was formally sentenced to death on the first degree murder charge, to a term of not less than five nor more than ten years on the conspiracy charge, and to a term of not less than ten nor more than 20 years on the robbery charge. N.T. 7/1/1987 at 72-74. The conspiracy and robbery sentences were to run concurrent with the death penalty sentence, but consecutive to one another.

Honorable David N. Savitt on July 28, 1987,[5] and then the judgments of sentence were affirmed by the Pennsylvania Supreme Court on February 8, 1990. Commonwealth v. Williams, 570 A.2d 75 (Pa. 1990) ("Williams I").

Appellee filed a *pro se* petition pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq.* on March 24, 1995.[6] The PCRA Court denied the petition on October 20, 1998.[7] On December 22, 2004, our Supreme Court affirmed the PCRA Court's decision. Commonwealth v. Williams, 863 A.2d 505 (Pa. 2004) ("Williams II"). Appellee subsequently filed a second PCRA petition on February 18, 2005, which was dismissed as untimely under 42 Pa.C.S. § 9545.[8] Our Supreme Court affirmed this dismissal, without an opinion, on September 27, 2006. Commonwealth v. Williams, 909 A.2d 297 (Pa. 2006).

In July of 2005, appellee filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Pennsylvania. On May 9, 2007, the Honorable Michael M. Baylson denied appellee's petition for writ of habeas corpus pursuant to § 2254, but granted a certificate of appealability, pursuant to 28 U.S.C. § 2253(c)(2) with respect to two issues – whether trial counsel was constitutionally ineffective during the penalty phase of trial and whether the Commonwealth exercised its peremptory strikes in a racially discriminatory manner in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Williams v. Beard, 2007 U.S. Dist. LEXIS 41310, ** at 182-83. On

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[5] Commonwealth v. Williams, No. 2362-37, slip op. (Pa. Ct. Com. Pl., July 28, 1987). Judge Savitt was the trial judge, and presided over and decided the PCRA petition appellee filed in 1995.

[6] Appellee's current counsel first appeared on appellee's behalf on May 14, 1996, and filed an Amended Petition on December 17, 1996.

[7] Judge Savitt's formal opinion denying this PCRA petition was filed on January 13, 1999. Commonwealth v. Williams, No. 2362-67, slip op. (Pa. Ct. Com. Pl., Jan. 13, 1999).

[8] Commonwealth v. Williams, No. 2362-67, slip op. (Pa. Ct. Com. Pl., May 26, 2005). In this petition, appellee claimed that the accomplice liability instruction allowed the jury to find appellee guilty of first degree murder without finding that he possessed the specific intent to kill.

March 9, 2011, the Third Circuit found that the Batson claim failed on its merits. Williams v. Beard, 637 F.3d 195, 219-20 (3d Cir. 2011). With respect to the ineffective assistance of counsel claim, the Third Circuit held that our Supreme Court's determination that appellee was not prejudiced by trial counsel's constitutionally deficient failure to present the mitigating evidence presented at the 1998 PCRA evidentiary hearings was not an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984).

The present litigation evolved roughly ten months after the Third Circuit's March 9, 2011 decision.[9] On January 9, 2012, appellee's counsel visited Marc Draper (Draper), the co-defendant in the Norwood killing and a principal Commonwealth witness at appellee's trial, while he was serving a life sentence for that killing at SCI-Frackville.[10] Draper signed a declaration pursuant to 18 Pa.C.S. § 4904, in which he stated, for the first time that, during a prep session prior to trial, he told detectives that the victim was a homosexual who was in a relationship with appellee. Declaration of Marc Draper, 1/9/2012 at 4. (See Attachment A, which is pages 11-17 of Exhibit P-16 in the PCRA hearing before this Court). Draper also stated that the detectives "wanted the motive to be a robbery and kept coming back to that. That's how they wanted me to testify, that it was a robbery." Id. Appellee's counsel returned to SCI-Frackville on March 1, 2012 and obtained another signed declaration from

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[9] Appellee's petition for rehearing in the Third Circuit was denied on July 26, 2011. Appellee then prepared and filed a petition for writ of *certiorari* in the United States Supreme Court. The petition was filed on December 13, 2011 and denied on June 29, 2012 *sub nomine*. Williams v. Wetzel, 2012 U.S. LEXIS 4903 (June 29, 2012).

[10] Draper pleaded guilty to second degree murder before Judge Savitt on February 21, 1986 for his role in the killing of Amos Norwood. He was represented by Harry Seay, Esquire. N.T 2/21/1986 at 1.

Draper. On the basis of those two statements, appellee filed the instant PCRA petition on March 9, 2012 and an Appendix to the petition on July 16, 2012.[11]

On July 24, 2012, appellee filed Petitioner's Memorandum, in which he argued that this PCRA Court should advise Governor Corbett that he need not sign an execution warrant in this case.[12] On July 27, 2012, appellee supplemented his Memorandum with Petitioner's Supplemental Petition for Post Conviction Relief and Notice of Filing Additional Evidence in Support of Stay of Execution along with an Appendix to that filing. The Commonwealth responded on July 31, 2012, filing a Brief in Opposition to Motion to Stay.

On August 6, 2012, this Court briefly heard argument on the issue raised in appellee's July 24, 2012 Memorandum that this Court should advise Governor Corbett not to sign appellee's execution warrant. However, at the hearing, appellee orally withdrew the request in light of the Commonwealth's representation that Governor Corbett planned to sign appellee's execution warrant three days later, on August 9, 2012. N.T. 8/6/2012 at 4-5. The Governor signed the warrant on August 8, 2012, and scheduled the execution for October 3, 2012.

On August 28, 2012, appellee filed Petitioner's Renewed Motion for Stay of Execution, citing public policy reasons to stay appellee's scheduled execution.[13] On

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[11] Appellee filed his current PCRA petition through counsel, the Federal Community Defender Office for the Eastern District of Pennsylvania ("FCDO"), who has represented him since 1996. Billy H. Nolas, Esquire, Shawn Nolan, Esquire, Eric Montroy, Esquire, and Jennifer Givens, Esquire entered appearances on appellee's behalf before this Court. Robin Godfrey, Esquire, Cari Mahler, Esquire and Ronald Eisenberg, Esquire entered appearances on the Commonwealth's behalf before this Court.

[12] Judge Savitt having retired, this PCRA matter was officially assigned to this Court on May 23, 2012. Based on the way in which the Post Trial Unit processes the PCRA paperwork, this Court first received the pleadings on or about July 24, 2012.

[13] Commonwealth v. Morris, 771 A.2d 727, 739 (Pa. 2001) ("Morris I") clearly dictates that trial courts do not have discretion to go beyond the corners of 42 Pa.C.S. § 9545(c) when determining whether or not to grant a stay of execution:

September 6, 2012, appellee filed a Motion for Discovery, requesting "any information relating to Marc Draper, Reverend Poindexter, and any informal or formal documentation pertaining to any of Marc Draper's other offenses, including, but not limited to, the Donna Friedman case" from the police homicide file.[14] Petitioner's Motion for Discovery, 9/6/2012 at 5. Additionally, appellee requested the production of exculpatory information contained in the Commonwealth's "secure archive"[15] as well as "any reports or notes made concerning Norwood's sexual relationship or sexual abuse of petitioner or any other child

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(FN cont'd...)

> Given that we have concluded that § 9545(c) does not violate either Article V, § 9 or 10 of the Pennsylvania Constitution and is therefore, within constitutional restraints, we hold a lower court may not exercise its inherent right to grant a stay except within the confines enumerated by § 9545(c). We are mindful of the fact that such a conclusion may seem harsh, especially where death is the ultimate result of the denial of relief in these instances, but we cannot ignore that at some point in the proceedings society's interest in finality becomes overarching. Accordingly, we conclude that a PCRA court is bound by the requirements of § 9545 and can only enter a stay when it has reasonably concluded that such requirements are met.

Despite our Supreme Court's landmark decision prohibiting trial courts from allowing factors beyond the scope of § 9545(c) to enter into the equation as to whether granting a stay of execution is appropriate, appellee's counsel exerted an enormous amount of time and resources to persuade this Court that public policy considerations merited entering a stay of execution. While a statement from the decedent's spouse and support from a myriad of sources might have been pertinent to a clemency proceeding, this Court found appellee's documentary support and oral argument in this regard to be irrelevant and a waste of the Court's time. And the Court agreed with the Commonwealth's position that seeking advisory opinions from the trial jurors as to what their verdict at the penalty phase would have been – if they had been told that the victim had molested appellee – was inappropriate and improper for a number of reasons.

[14] Donna Friedman, a pregnant woman who lived in the Mt. Airy section of the city, was murdered on July 3, 1984. Police were doggedly trying to solve her murder – which remains unsolved to this day – and considered Draper and appellee suspects. In the PCRA evidentiary hearing before this Court, Draper maintained that, on July 20, 1984 – the day he was arrested for his involvement in the Norwood case – police threatened him with the death penalty for having killed Ms. Friedman. N.T. 9/20/2012 (P.M.) at 182-88. He stated that the threat of being charged with the Friedman murder was one of the reasons why he cooperated with police, and why he refrained from speaking about the Norwood murder over the years. Id. at 188-89. This Court found that testimony credible, and considered it as part of the determination regarding jurisdiction under 42 Pa.C.S. § 9545(b), as discussed *infra*.

[15] The Commonwealth represented to this Court that it filed "secure archive information" during the federal habeas corpus litigation of this case. According to the District Attorney's Office, it was an "old mental health evaluation" in microfilm "maintained by a court or some agency, not by the Commonwealth or the police," and there was "no overlap" between that evaluation and the evidence uncovered during this PCRA litigation. N.T. 9/24/2012 at 5-6.

under the age of 18." Id. at 5-6. The Commonwealth filed its Motion to Dismiss and Opposition to Stay of Execution on September 7, 2012.

On September 10, 2012, this Court heard argument on the pleadings, and permitted appellee the opportunity to obtain and submit additional information from Draper by September 13, 2012 at 5 P.M.[16] N.T. 9/10/2012 at 101-02. The following day, this Court heard the Commonwealth's argument that Draper should be appointed counsel prior to appellee's counsel being permitted to speak with him. N.T. 9/11/2012 at 8-10. The Commonwealth's motion to have counsel appointed for Draper was denied. Id. at 17. Appellee's counsel obtained and filed Draper's third statement, an affidavit, on September 11, 2012. (See Attachment B, which is pages 1-10 of Exhibit P-16 in the PCRA hearing before this Court).

On September 14, 2012, this Court heard further argument from appellee as to the timeliness of the current petition, after which this Court found that there was an issue of material fact meriting an evidentiary hearing pursuant to Pa.R.Crim.P. 909(B)(1) in order to determine whether government officials pressured Draper to testify that appellee's motive for the crime was to rob Amos Norwood, not to kill him because of a homosexual relationship between them. The evidentiary hearing was scheduled for September 20, 2012; Draper and Andrea Foulkes, the trial prosecutor, were the only two witnesses expected to testify.[17] Additionally, in an effort to ensure that potential pre-hearing preparation did not interfere with the credibility determinations that this Court would ultimately have to make,

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[16] At the conclusion of the September 10, 2012 argument, appellee, who had been brought in from SCI-Greene, agreed to waive his presence at all future hearings. N.T. 9/10/2012 at 108.

[17] Pa.R.Crim.P. 909(B)(3) requires that an evidentiary hearing be scheduled no fewer than ten days nor more than 45 days after the date of the order setting a date certain for the hearing. In light of the extenuating circumstances in this case – merely 18 days separated the September 14, 2012 argument from the impending execution – this Court scheduled the evidentiary hearing six days after that argument. Neither party objected to the expedited evidentiary hearing.

this Court prohibited both parties from communicating with the two witnesses prior to the hearing.[18] Order to Comply, 9/14/2012. On September 18, 2012, this Court ordered that the Commonwealth produce the trial files for the two cases which Ms. Foulkes prosecuted against appellee in 1985 and in 1986, and in which Draper was the key Commonwealth witness – the Herbert Hamilton and Amos Norwood murders, respectively.[19]

This Court conducted the evidentiary hearing on September 20 and September 24, 2012. On Saturday, September 22, 2012, this Court directed that the Commonwealth also produce the Philadelphia Police Department's files concerning the same two cases.[20] After Draper's testimony concluded on the 24th, both sides were given an opportunity to look through those police files. On September 25, 2012, the documents uncovered during the parties' review, as well as during the Court's independent review of same, were introduced

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[18] As soon as this Court granted an evidentiary hearing, the Commonwealth's attorneys handed up a writ to have Draper, whom they had already requested to be sent from SCI-Frackville to SCI-Graterford, be transported by District Attorney's Office detectives to their office to be interviewed. N.T. 9/14/2012 at 71. The Court declined to issue the writ, but had concerns that "prepping" the two witnesses expected to testify would affect their recollection and spontaneity when testifying before this Court. Id. at 83-84. For this reason, the Court entered an order prohibiting any communication between counsel and the two witnesses. Prior to this Court's Order prohibiting such communication, the Commonwealth had provided Ms. Foulkes, now an Assistant United States Attorney in the Eastern District of Pennsylvania, with a CD that contained all of the pleadings relevant to the instant litigation as well as the Notes of Testimony from all hearings dating back to the Herbert Hamilton trial. N.T. 9/20/2012 (P.M.) at 34. The contents of the CD are listed in Attachment C. When this Court issued its Order, Ms. Foulkes was asked to turn over the CD, which she did. Ms. Foulkes had asked for an opportunity to review the two files to which she had been assigned, and she was permitted to do so. But this Court found that what was on the CD went well beyond that.

[19] The Commonwealth did not object to this Court's directive that the trial files be produced. Both sides had an opportunity to go through these files and mark documents that they intended to utilize at the evidentiary hearing before this Court. The only aspect of the files exempted from disclosure and review was the trial prosecutor's notes regarding jury selection. This Court reviewed those files *in camera* and found them irrelevant to the instant matter other than as discussed in the Appendix.

[20] The Philadelphia Police Department provided First Assistant District Attorney Edward McCann two boxes, labeled H-84-026 (Herbert Hamilton victim) and H-84-127 (Amos Norwood victim). "H" stands for Homicide, "84" stands for the year, and the last numbers represent which murder case it was, chronologically. Mr. McCann had the two boxes immediately transported to this Court. Again, the Commonwealth did not object to this Court ordering their production and inspection.

into evidence.[21] Having filed Petitioner's Motion to Conform the Petition to the Hearing Evidence and to Supplement and Amend on September 24, 2012, appellee reiterated this on September 25, 2012, making an oral motion to "conform the [appellee's] proof to the evidence submitted at the hearing and to have [the Court] allow us to take the testimonial evidence from the hearing and the documents from the hearing as an amendment and supplement to our petition." N.T. 9/25/2012 at 51. This Court granted appellee leave to amend.[22] Id. at 77. Thereafter, appellee in fact amended his PCRA petition, filing an Amendment and Supplement to Petition for Post-Conviction Relief on the morning of September 28, 2012, wherein he asserted, among other things, that the Commonwealth presented the jury with "sanitized characterizations of the victims in this case," and argued for relief on the basis of Cone v. Bell, 556 U.S. 449 (2009) and Banks v. Dretke, 540 U.S. 668 (2004). Subsequent to that filing on September 28, 2012, this Court ruled on appellee's issues, denying all guilt-phase issues but granting relief in the form of a new penalty phase

[21] The information uncovered from the District Attorney's files and the Philadelphia Police Department's files will be referred to in this Opinion collectively as the "government's files," based on the holding in Kyles, that prosecutors have a duty to learn of any favorable evidence known to others "acting on the government's behalf in this case, including the police." Kyles v. Whitley, 514 U.S. 419, 437 (1995); Commonwealth v. Gibson, 951 A.2d 1110, 1127 (Pa. 2008); Commonwealth v. Burke, 781 A.2d 1136, 1142 n.5 (Pa. 2001).

[22] See Pa.R.Crim.P. 905(a) ("The judge may grant leave to amend or withdraw a petition for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice.").

hearing for the reasons discussed below.[23] The Court also entered an Order staying appellee's execution.[24]

FACTS

The facts presented at trial substantiating appellee's first degree murder, robbery and criminal conspiracy convictions have been presented in detail by our Supreme Court and by the Third Circuit. Williams I, 570 A.2d at 77-79; Williams, 637 F.3d at 198-202. The basic facts underlying appellee's conviction for the murder of Amos Norwood are as follows[25]:

On Monday, June 11, 1984, appellee met Draper at Mount Pleasant Avenue and Lincoln Drive to gamble with a few other friends. N.T. 1/22/1986 at 665. After gambling for close to an hour, the pair ran out of money. Id. at 666. Appellee told Draper that "he had an idea that he knew somebody around the corner to get some money from." Id. at 667. Appellee explained to Draper that this source of money was a man he knew named Amos, whom he had met at a bar downtown. Id. Appellee told Draper that he was "going to try to extort him by telling his wife that he was a homosexual." Id. at 667-68. The two

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[23] As a necessary component to the Court's ruling, the Court was constrained to conclude that the trial prosecutor was less than candid when testifying at the September 2012 PCRA evidentiary hearing. Based on her testimony concerning the two cases which she prosecuted against appellee, this Court ultimately concluded that the trial prosecutor engaged in "gamesmanship," knowingly suppressing evidence that she believed was substantially similar to that which led to a compromise verdict in the Hamilton case. Intentionally rooting evidence out of the Norwood prosecution in order to secure a first degree murder conviction and death penalty sentence constitutes "gamesmanship." Some of the credibility determinations that led this Court to that conclusion are delineated and discussed in the body of this Opinion. The Court has also attached an "Appendix," detailing how Ms. Foulkes' testimony before this Court and instances from her prosecution of appellee led to this Court's credibility determinations. The Appendix is explicitly made a part of this Opinion and is incorporated herein by reference.

[24] On September 28, 2012, this Court found that the other claims raised by appellee in his March 9, 2012 petition with respect to CP-51-CR-0823621-1984 (Norwood case) were without merit. N.T. 9/28/2012 at 12-13. A notice of appeal regarding those rulings was filed on October 25, 2012, but a docketing number has not yet been assigned for that cross-appeal. A separate opinion regarding that appeal will be filed in due course. This Court did not make any decision with respect to CP-51-CR-0907971-1984 (Hamilton case), as the focus was on the matter in which Governor Corbett had signed an execution warrant which was to be effectuated on October 3, 2012.

[25] Draper was the sole Commonwealth witness to testify about the events leading up to Amos Norwood's death.

walked together towards this man's home; however, before they arrived at their destination, appellee told Draper to wait at the top of the street while appellee entered the home. Draper estimated that he had to wait for 20 minutes before he saw appellee emerge with $10 in hand. Id. at 668-69. As Draper asked appellee about the money, a woman walked past them towards the Norwood home; appellee told Draper that woman was Mr. Norwood's wife. Appellee said, "Excuse me, Miss, excuse me, Miss," but the woman did not hear him. Id. at 670.

The pair then returned to the corner where they had been gambling. Roughly ten minutes later, appellee stood up and said, "There goes my uncle,"[26] as Mr. Norwood drove past the group. Id. at 671. Appellee ran to the car, got in, and drove off with Mr. Norwood on Lincoln Drive. Id. They returned a few minutes later, and appellee stepped out of the car. He walked to Draper and told him to get in the car and "play it off like you going home, like you want a ride home, and we gonna take some money." Id. at 672. Once he sat in the backseat, Draper gave Mr. Norwood "phony directions," directing the car towards a dark street adjacent to a cemetery. Around that time, Draper grabbed Mr. Norwood from his position in the backseat and appellee ordered Mr. Norwood out of the car. Id. at 673-74. At appellee's direction, the three men walked towards the edge of the cemetery. Appellee jumped the fence into the cemetery first, followed by Mr. Norwood and then Draper. Id. at 674. After walking into the dark, appellee told Mr. Norwood to lay down. Appellee and Draper took Mr. Norwood's clothes off and used them to hogtie him. Mr. Norwood said the pair could just take the money and leave, but appellee refused, ordering Draper to stand with Mr. Norwood while he ran back to the car. Appellee returned with a handful of tools

[26] At the PCRA evidentiary hearing before this Court, Ms. Foulkes testified that, from her prosecution of appellee for killing Herbert Hamilton, she understood the term "uncle" to be a term of "familiarity." In the Hamilton trial, Antonio Williams had referred to his older homosexual lover, decedent Herbert Hamilton, as his "uncle." N.T. 9/20/2012 (A.M.) at 16-19.

including a socket wrench and a tire iron. Despite Draper's pleading with appellee to leave, appellee "started getting mad" and hit Mr. Norwood with a tire iron. Appellee then ordered Draper to hit Mr. Norwood with the socket wrench. Id. at 679-81. Together the pair beat Mr. Norwood until he appeared to be dead, pulled Mr. Norwood's body between two tombstones, and then took Mr. Norwood's car.[27] Id. at 682. That night, appellee returned to the cemetery by himself, soaked Mr. Norwood's body in gasoline and set it on fire. Id. at 688.

LEGAL ANALYSIS

Petitioner raises the following issues on appeal:

1. Was the lower court without jurisdiction to consider defendant's third PCRA petition where his timeliness exception claims[28] raised a claim known to him years before he filed the petition?
2. Whether the lower court erred in finding that the information allegedly suppressed by the Commonwealth was otherwise unavailable to defendant, would have been helpful to his case and admissible, and met the legal standard for "materiality."[29]

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[27] Once they left the cemetery, the two men threw Mr. Norwood's possessions into a metal trash can in a nearby Pathmark parking lot. The next day, they returned to the trash cans, and fished through them for credit cards or money. After finding Mr. Norwood's credit card and AT&T phone card, the pair went to Atlantic City with a man named Ronald Rucker to try to get money from the credit card. Id. at 689-90.

[28] This Court found as valid only one timeliness exception claim – governmental interference. The "claim" that was "raised" by the "timeliness exception claims," which the Commonwealth alleges was known to appellee "years before he filed the petition" is presumably the underlying Brady claim upon which this Court found appellee is entitled to relief under 42 Pa.C.S. § 9543(a)(2)(i). As discussed *infra*, appellee did not know of this Brady claim – based on withheld evidence of Norwood's sexually inappropriate behavior – "years before he filed the petition."

[29] On October 3, 2012, appellant filed both a Notice of Appeal and a Statement of Errors Complained of on Appeal Pursuant to Pa.R.A.P. 1925(b) (Statement of Errors). On October 12, 2012, appellant applied for leave to amend its Statement of Errors and affixed an Amended Statement of Errors, which included the second issue addressed herein. The Court issued an Order on October 15, 2012, formally accepting appellant's Amended Statement of Errors.

Appellee's timeliness exception claim of governmental interference, which this Court found was established and which accorded this Court jurisdiction, did not raise a claim known to appellee for years before he filed the instant petition; appellee actually learned of his claim – a claim of suppressed material evidence which this Court found met all the requirements under Brady v. Maryland, 373 U.S. 83 (1963) – during the evidentiary hearing which was ordered in this case.

This Court found that the Commonwealth suppressed multiple pieces of evidence, all of which shared a common feature: each strengthened the inference that Amos Norwood was sexually involved with boys around appellee's age at the time of his murder. The Commonwealth withheld one such statement entirely[30] and turned over to the defense two "sanitized" statements.[31] In those "sanitized" statements, direct and indirect evidence of Mr.

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[30] This was evidenced by Ms. Foulkes' handwritten note found in the District Attorney's Office's Norwood trial file. Ms. Foulkes had a conversation in which she learned that Ronald House, a 16-year old boy in Amos Norwood's church, was groped "on privates" by Mr. Norwood, and that there were other "possible incidents." N.T. 9/20/2012 (P.M.) at 120-23. (See Attachment D, marked as Exhibit Court-2 before this Court, page 2). For this Court's discussion of how Ms. Foulkes' pattern of selective non-disclosure amounted to "gamesmanship," see Appendix.

[31] This was evidenced by a June 1984 police activity sheet. Mamie Norwood, Amos Norwood's widow, and Reverend Charles Poindexter, Amos Norwood's colleague at St. Luke's Church and friend for almost 30 years, both made statements to police about Mr. Norwood's homosexual involvement with teenage boys in his community. The police activity sheet revealed that Mrs. Norwood told police about a time in which she awoke at 2 AM to find a "young male, slim," standing silently in the hallway of her home. Mrs. Norwood explained to police that her husband woke her to ask her for money. Mrs. Norwood told police that "at that point" she believed it to be a kidnapping. She watched as her husband loaded some stereo equipment into his car, and then he got in and drove off with the young man. Mrs. Norwood said that her husband returned home around 9-10 AM the next day and told her a "rambling" story about being "abducted," but that he was able to "escape" after using "psychology" on the captors "until they fell asleep." Mrs. Norwood remembered that he pleaded with her not to get the police involved. Additionally, Mrs. Norwood's eldest daughter was present during the interview, "but made no comment on her belief in the veracity of the story." (See Attachment E, marked as Exhibit P-24 before this Court, page 2). In the version of Mamie Norwood's statement that was disclosed to the defense, this entire account was omitted. (See Attachment F, marked as Exhibit C-2 before this Court, item 17). In fact, the only mention of Mr. Norwood driving young males in his car was Mrs. Norwood's statement: "[m]y husband would drive the kids home [from church] who didn't have a ride so a lot of people were in his car at times," and that "he would have to know the person very well to pick them up. He never picked up strangers." Id.

The same police activity sheet also revealed that Reverend Poindexter told police "in confidence" that Mr. Norwood "may have been a homosexual," and that he had "in fact received a complaint about five years ago from the mother of a 17 year old parishioner that deceased had propositioned the 17 year old for sex, (male)." (See Attachment E, marked as Exhibit P-24 before this Court, page 1). Additionally, the activity sheet noted

Norwood's ephebophilia[32] had been omitted, the government interfered with appellee's ability to present the claim that his due process right to a fair trial had been violated. This claim has not been waived, nor previously litigated, as it is based on information discovered in September 2012. The suppression of this evidence, which could have been used to develop *and* pursue an alternate theory at the penalty phase, undermines confidence in the jury's death sentence, thereby constituting a meritorious claim of a constitutional violation under Brady v. Maryland, 373 U.S. 83 (1963) and Cone v. Bell, 556 U.S. 449 (2009).[33]

I. Jurisdiction

For this Court to have jurisdiction to grant appellee's PCRA petition, the petition must have been filed within one year of the date that the judgment became final, or appellee must prove one of the three timeliness exceptions delineated in 42 Pa.C.S. §§ 9545(b)(1)(i)-(iii). See 42 Pa.C.S. § 9545(b)(1). Given that the judgment against appellee became final decades ago, jurisdiction would not exist without appellee satisfying a timeliness exception. Additionally, the instant petition had to be filed within 60 days of the date that it could have

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(FN cont'd...) that Reverend Poindexter "added that deceased had worked with juvenile males in the parish for years, doing counciling [sic] work for disturbed males, and males with family problems." Id. In the version of Reverend Poindexter's statement that was disclosed to the defense, all mention of homosexuality was removed. (See Attachment G, marked as Exhibit C-2 before this Court, item 19). In response to the question by police, "Do you know of any problems Mr. Norwood had in the past?," the statement included an answer about how five years earlier, men "came to [Mr. Norwood's] house, and told his wife, they had him in the car and wanted money." Id.

[32] "Ephebophilia" is the psychological term for the attraction of adults to adolescents. It derives from the root "ephebe," which means "a young man." Webster's New Encyclopedic Dictionary 610 (2002).

[33] This Commonwealth has had the death penalty in effect since its reinstatement in 1978 and, as the law of this Commonwealth, this Court has followed it in presiding over more than a dozen capital cases and in imposing the jury's verdict of death in three of those cases. An integral part of the jurisprudence of the death penalty is that it is for the jury to decide whether the defendant and the case before them is more – or less – deserving of the death penalty. See Commonwealth v. Blount, 647 A.2d 199, 209 (Pa. 1993) (finding that the process of weighing aggravating and mitigating factors is the "exclusive function of the jury"). Inherent in this determination is that the jury be given the full picture of what the case was about, and what may have prompted the defendant's unlawful actions – including behavior of the victim as it relates to the circumstances of the offense and of the defendant. By withholding from the jury the full picture in the instant case, the trial prosecutor elected to put herself in the role of controlling what the jury's verdict should be, thereby usurping the jury's unique role in the determination of the penalty.

first been presented. 42 Pa.C.S. § 9545(b)(2). Our Supreme Court has indicated that the 60-day rule requires appellee to "explain why, with the exercise of due diligence, the claim could not have been filed earlier." Commonwealth v. Marshall, 947 A.2d 714, 720 (Pa. 2008), *citing* Commonwealth v. Breakiron, 781 A.2d 94, 98 (Pa. 2001).

(1) 42 Pa.C.S. § 9545(b)(1)

In this case, the Court concluded that appellee satisfied the first timeliness exception, "governmental interference." "Although a Brady violation may fall within the governmental interference exception, the petitioner must plead and prove the failure to previously raise the claim was the result of interference by government officials, and the information could not have been obtained earlier with the exercise of due diligence." Commonwealth v. Abu-Jamal, 941 A.2d 1263, 1268 (Pa. 2008), *citing* Breakiron, 781 A.2d at 98 (combining the requirements of § 9545(b)(1)(i) and § 9545(b)(2)). When a claim of governmental interference is rooted in the Commonwealth's failure to produce exculpatory evidence, appellee bears the burden to "identify a specific claim that he was unable to discover or develop due to the District Attorney's conduct." Commonwealth v. Howard, 788 A.2d 351, 355 (Pa. 2002), *citing* Commonwealth v. Yarris, 731 A.2d 581, 588 (Pa. 1999). In Howard, the petitioner could not demonstrate governmental interference because he failed to "explain how the District Attorney's conduct hobbled his development or prevented his discovery of any particular claim." Howard, 788 A.2d at 355. Likewise in Commonwealth v. Stokes, the petitioner was aware of potentially exculpatory information in files maintained by the United States Postal Service and the Philadelphia Police Department for years before he sought them, and he "never asserted that the prosecution (or anyone else) prevented him from gaining access to these files in the 12 years between the date his direct appeal was decided

and the date he ultimately sought the files." 959 A.2d 306, 310 (Pa. 2008). Accordingly, Stokes' governmental interference claim was fatally flawed. Id. at 311.

In the instant matter, this Court found that appellee met its burden of identifying a specific claim he was unable to discover or develop due to the government's conduct. This Court found that the government interfered with appellee's presentation of a claim under Brady in two ways. First, the act of removing pertinent information from a statement, and providing a "sanitized" version, which purports to be the entirety of the statement, is interference in and of itself. The government's sanitization of Mamie Norwood's and Reverend Charles Poindexter's statements, and flat non-disclosure of information about Amos Norwood's sexual advances on Ronald House, interfered with appellee and his attorney learning that Mr. Norwood had engaged in sexually inappropriate behavior with teenage boys other than appellee. By scrubbing these statements of references to Mr. Norwood's sexual improprieties and then providing the "clean" versions, the government created the false impression that appellee was given the full account of what these witnesses stated. That false impression "hobbled" appellee's ability to "discover or develop" a Brady claim rooted in information removed from the scrubbed statements. That false impression was maintained by the Commonwealth until the original statements were found – in the government's files and some in the very handwriting of the trial prosecutor.

Second, throughout the litigation of this case, the government has disputed the existence of information in their files about Amos Norwood's homosexual ephebophilia, thus further interfering with appellee learning the facts that form the basis of the instant Brady claim. In Stokes, our Supreme Court affirmed the PCRA Court's determination that there had been no governmental interference, as the petitioner was aware of the existence of information in the files of the United States Postal Service and the Philadelphia Police

Department for years. Stokes, 959 A.2d at 310. In fact, the trial prosecutor in that case maintained an "open file" policy, which highlighted how the *government* had given the petitioner access to relevant information. Id. at 311. The government's behavior in this case is notably different. Here, the government has continually denied the existence of exculpatory evidence.

At the 1998 evidentiary hearing regarding appellee's 1995 PCRA petition, the government intervened as appellee attempted to put forth evidence that Amos Norwood had been sexually abusive towards young boys, including appellee. When appellee proffered that evidence, Judge Savitt looked to the Commonwealth for clarification, asking directly: "there is nothing in the case involving Norwood's homosexuality or violation of young boys[?]" N.T. 4/8/1998 at 237. The Commonwealth responded to Judge Savitt's question, "Oh, no, just that he knew about Norwood's behavior and was trying to extort money[34] from it."[35] Id. Precisely the evidence that Judge Savitt asked for was sitting in the

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[34] The "extortion" plot referenced by the Commonwealth in response to Judge Savitt's question is different from the evidence that the government suppressed. In his July 20, 1984 statement to police and again at trial in the Norwood case, Draper said that appellee suggested that the two men "extort" Mr. Norwood by telling his wife that he was gay. See Attachment O, which was marked as Exhibit P-2 in the PCRA hearing before this Court; N.T. 1/22/1986 at 667-68. Ms. Foulkes referenced this in her opening statement. N.T. 1/14/1986 at 44. Draper's testimony that appellee said he might exploit his knowledge of Mr. Norwood's sexual *orientation* is critically different from evidence that Mr. Norwood molested and/or attempted to molest teenage boys.

[35] The record of this discussion reflects that Judge Savitt and ADA Silverstein were talking at the same time towards the tail end of Judge Savitt's question about Norwood's violation of young boys.

> THE COURT: But there is nothing in the case involving Norwood's homosexuality or violation of young boys –
> ADA SILVERSTEIN: Well, that was the secret.
> THE COURT: – that accrued that was involved.
> ADA SILVERSTEIN: Oh, no, just that he knew about Norwood's behavior and was trying to extort money from it. It didn't work so it moved on to robbery and murder, so it was not a secret. It was not a secret to anyone at that time.

N.T. 4/8/1998 at 235-37.

The only reasonable way to read the back-and-forth is that when ADA Silverstein responded, "Oh no, just that he knew about Norwood's behavior and was trying to extort money from it," that he was responding to Judge Savitt's question.

government's files. Without that evidence, the Court forcefully attacked the relevance of testimony proffered by the defense as to any potential sexual impropriety in Norwood's past. Based on the Commonwealth's affirmative misrepresentation[36] that there was nothing else in the case involving Norwood's "homosexuality or violation of young boys," Judge Savitt prevented both lay witnesses and expert witnesses from developing that issue. Id. at 158-59, 181-82; N.T. 4/9/1998 at 360-61; N.T. 4/13/1998 at 597-605.

There is nothing in the text of § 9545(b)(1)(i) requiring that the Commonwealth *maliciously* interfere in the presentation of a claim. Our Supreme Court has long held that the statutory language of the PCRA must be "strictly adhered to." Commonwealth v. Pursell, 724 A.2d 293, 303 (Pa. 1999). The plain language of § 9545(b)(1) requires only that "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution." Therefore, the PCRA prosecutor's state of mind when representing to the Court that there was nothing in this case about the victim's violation of young boys is not dispositive. Based on the statement of the Commonwealth, Judge Savitt stated that he would "not consider [Mr. Norwood's desire to have sex with kids] as a fact unless on the – on this bare assertion. Now, you should understand that. There would have to be evidence of it and, in other words, what was seen, when it was seen, who was present, who was involved."[37] N.T. 4/13/1998 at 602. Having removed such evidence from the case prior to trial, the government's continuing assertion

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[36] As discussed *infra*, the trial prosecutor is charged with a duty to "learn of" what exculpatory evidence is in the police files. Kyles, 514 U.S. at 437; Gibson, 951 A.2d at 1127; Burke, 781 A.2d at 1142 n.5. The PCRA prosecutor was specifically questioned by the Court as to whether exculpatory evidence was in "the case." As per the dictates of Kyles and its progeny, "the case" encompasses both the District Attorney's Office and police files. The prosecutor's manner of response implied that he had gone through all pertinent files in the case and found nothing. In fact, the information that he stated did not exist was in the government's files and obviously had not been turned over.

[37] This Court does not disagree that bare assertions are insufficient. However, the evidence uncovered in the government's files possesses the necessary degree of specificity.

that no such evidence existed amounted to continuing governmental interference from the time of trial until the government's files were ordered to be opened in September 2012.[38]

(2) 42 Pa.C.S. § 9545(b)(2)

In its Statement of Errors, the Commonwealth argues that appellee's "timeliness exception claims raised a claim known to him years before he filed the petition." In order to answer the Commonwealth's claim of error, this Court must identify when appellee's timeliness exception claim became known to him. Appellee could not have known that the government interfered with the presentation of evidence about Amos Norwood's homosexual ephebophilia until such evidence was uncovered. It became clear for the first time in September 2012 that the Commonwealth made incomplete disclosures to defense counsel at the time of trial, and that the government's representations to the 1998 PCRA Court were, in fact, misrepresentations.[39] Within 60 days of the date that the instant Brady

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[38] As there is – and was – a close working relationship between the District Attorney's Office's Homicide Unit and the Philadelphia Police Department Homicide Unit, the Assistant District Attorneys assigned to this case could have reviewed the contents of the Police Department's files at any time. Yet as late as the September 14, 2012 hearing before this Court, ADA Ronald Eisenberg himself made a statement which was not entirely true about the scope of the evidence: "[Y]es, there was one piece of a homosexual element to the case. The defendant said he could extort money from Norwood by threatening to reveal that he was gay. That's what he [Draper] said starting from the first time he ever spoke to police about this case." N.T. 9/14/2012 at 57. In addition to the note about Ronald House's sexual abuse as discussed *supra*, there were in fact multiple handwritten notes by Ms. Foulkes referencing homosexuality. On a note titled "Ask Marc," Ms. Foulkes wrote, "What motivates Terry? Money, self, betrayal, homosex." (See Attachment H, which was marked as P-5 in the PCRA hearing before this Court). In a note found in the Hamilton trial box titled "prep – M.Draper 12-20-84 PAB," Ms. Foulkes wrote "knew that Terry made $ by going to bed w/men." (See Attachment I, which was marked as P-8 in the PCRA hearing before this Court). And on another note titled "Marc Draper 12-27-85," Ms. Foulkes jotted down the sequence of events from the Norwood killing, and included the following details: "did he [Mr. Norwood] know Terry – liked boys." On the next page, Ms. Foulkes wrote, "did he like boys," and below that "how long had he known Terry." (See Attachment J, which was marked as P-9 in the PCRA hearing before this Court). Lastly, on another note Ms. Foulkes made a more general, though cryptic, reference about the state of the case: "continued investig. for faggot squad." N.T. 9/20/2012 (A.M.) at 37-40.

[39] The United States Supreme Court's opinion in Banks v. Dretke, 540 U.S. 668, 698 (2004) offered persuasive guidance to this Court about the impact of government misrepresentations regarding the existence of evidence on whether a defendant can fairly be considered not diligent for pursuing such evidence.

> In summary, Banks's prosecutors represented at trial and in state postconviction proceedings that the State had held nothing back. Moreover, in state postconviction court, the State's pleading denied that Farr was an informant. It was not incumbent on Banks to prove these representations false; rather,

claim first could have been presented, appellee filed his September 28, 2012 amendment to his PCRA petition, wherein he explained "why, with the exercise of due diligence, the claim could not have been filed earlier," thereby satisfying the second "jurisdictional" requirement. 42 Pa.C.S. § 9545(b)(2); Marshall, 947 A.2d at 720, *citing* Breakiron, 781 A.2d at 98.

For a court to have jurisdiction over a PCRA petition filed more than one year after the date the judgment became final, both § 9545(b)(1) and § 9545(b)(2) mandate that the petitioner explain the delay in raising "the claim."[40] In a Brady case, this claim-centric perspective means that appellee must set forth "when and how he discovered the Brady material that the Commonwealth allegedly withheld from him." Breakiron, 781 A.2d at 98. Likewise, in Commonwealth v. Hawkins, our Supreme Court analyzed the jurisdictional requirements of § 9545 in the context of a Brady claim by asking when "the facts upon which [the appellant's] Brady claim is based were first revealed," and whether "due diligence would not have revealed them before that time." 953 A.2d 1248, 1253 (Pa. 2008).

In the instant matter, the facts substantiating appellee's Brady claim were first discovered in September 2012. Appellee's due diligence would not have revealed that prior to the PCRA hearing before this Court.[41] Based in part on Draper's January 9, 2012

(FN cont'd...) Banks was entitled to treat the prosecutors' submissions as truthful. Accordingly, Banks has shown cause for failing to present evidence in state court capable of substantiating his Fart Brady claim.

[40] 42 Pa.C.S. § 9545(b)(1)(i) requires that "the failure to raise the claim was the result of interference by government officials . . . ." (Emphasis added). 42 Pa.C.S. § 9545(b)(2) requires that "[a]ny petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented." (Emphasis added).

[41] Appellee's September 6, 2012 discovery request for exculpatory information about Norwood's sexual relationships with children under the age of 18 was based on statements made by Reverend Charles Poindexter and Ronald House to appellee's counsel in early 2012. Appendix to Petition for Post-Conviction Relief, 7/16/2012, items 10 and 11 respectively. At that time, Reverend Poindexter stated that Norwood "seemed to have lots of close relationships with young men, most of whom I didn't know. We began to suspect that Amos was having inappropriate relationships with young men." Id. at item 10, paragraph 6. Reverend Poindexter also stated that "the mother of a 15-year old boy" told him "that while Amos was driving her son home from a youth group event, Amos touch [sic] her son's genitals. She also told me that Amos had inappropriately touched a number of other boys at the church." Id. at item 10, paragraph 15. Reverend Poindexter identified

declaration that he had been pressured to testify that appellee's motive for the crime was to rob the victim, and not to go into detail about their homosexual relationship, appellee filed the instant PCRA petition on March 9, 2012. This Court found that appellee's claim had arguable merit and, if sufficiently proved at an evidentiary hearing, potentially satisfied the

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(FN cont'd...) Ronald House as a victim of Norwood's sexual advances. Affidavits of Jennifer Givens and Eric Montroy, 9/27/2012 at 2 (See Attachment K). On the basis of that statement of Reverend Poindexter, appellee's attorneys interviewed Mr. House, who said that Mr. Norwood propositioned him for sex when he was 17, and had done the same thing to a friend of his named Bernard. Appendix to Petition for Post-Conviction Relief, 7/16/2012, item 11, paragraphs 4-6.

Appellee's attorneys went to speak with Reverend Poindexter on January 12-13, 2012 after having spoken with Draper on January 9, 2012. On that date, Draper stated that he had told detectives during trial prep sessions that:

> Norwood was a homosexual and that he was in a relationship with Terry and that that is what this case was really about. They did not want to hear that. They wanted the motive to be a robbery and kept coming back to that. That's how they wanted me to testify, that it was a robbery.

Declaration of Marc Draper, 1/9/2012 at 4. (See Attachment A, which is pages 11-17 of Exhibit P-16 in the PCRA hearing before this Court).

After Draper "disclosed for the first time the information stated in paragraphs 4 [quoted above] and 7," appellee's attorneys "looked into potential witnesses who might know something confirming the new disclosures by Mr. Draper." Affidavits of Jennifer Givens and Eric Montroy, 9/27/2012 at 2 (See Attachment K).

> We reviewed the 6/22/84 police report (with a statement from Reverend Poindexter) provided by the Commonwealth in discovery to Mr. Panarella, which included this comment from Reverend Poindexter: "Several years ago, within the last 5 years, he [Mr. Norwood] was abducted and the men came to the house, and told his wife they had him in the car and wanted money."

Id.

Draper's January 9, 2012 declaration cast Reverend Poindexter's June 22, 1984 statement in an entirely new light. Draper's allegations that the police pushed him to re-shape a story about a sexual relationship gone wrong and to call it a "robbery" would lead a diligent attorney to take a second look at any other possible instances in which witnesses had told police about prior "robberies" involving Amos Norwood. The reference to Norwood's prior robbery in the disclosed version of Reverend Poindexter's June 22, 1984 statement sounds bizarre at first blush. But when viewed through the lens of Draper's January 9, 2012 declaration – that "robbery" was the brush used to sweep homosexual impropriety under the rug – Reverend Poindexter's statement called for follow-up. And though that follow-up led to Reverend Poindexter saying there was much more to Amos Norwood and led to Ronald House detailing his experience with Mr. Norwood, it did not lead to knowledge that the government had had this information all along. That only came about after this Court ordered the District Attorney's and Police Department's files opened.

And, as it turned out, it was shown that the government had removed references to Mr. Norwood's homosexual ephebophilia from Reverend Poindexter's statement, and from Mamie Norwood's, thereby making it seem that Mr. Norwood was just a kind church volunteer who had been the victim of a bizarre robbery years earlier.

requirements of § 9545(b)(2).[42] At the evidentiary hearing, appellee discovered exculpatory evidence that had been in the government's files since the time of trial and had never before been turned over to the defense. After the hearing, appellee requested leave to amend his March 9, 2012 PCRA petition to include a more nuanced Brady claim focused on the evidence uncovered. N.T. 9/25/2012 at 51. That request was granted, and on September 28, 2012, appellee filed an Amendment and Supplement to Petition for Post-Conviction Relief. Therein, appellee argued that he was entitled to relief based on information that came to light for the first time in September 2012 – namely that the government withheld multiple statements from trial counsel, all of which strengthened the inference that Amos Norwood was sexually inappropriate with a number of teenage boys in his community.

This latter claim could not have been filed earlier with the exercise of due diligence because appellee was unable to gain access to the government's trial files until this Court granted an evidentiary hearing on September 14, 2012. In fact, appellee was duly diligent in pursuing this evidence. Appellee attempted to elicit testimony at the 1998 PCRA hearing about the victim's homosexual ephebophilia through fact witnesses James Villareal and Donald Fisher. N.T. 4/8/1998 at 229; N.T. 4/13/1998 at 597-605. However, appellee was stifled in his presentation of that evidence by the Commonwealth's steadfast representation that there was no such evidence, and Judge Savitt's consequent limitation on the 1998 PCRA

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[42] In Morris II, our Supreme Court noted that, when deciding whether a stay of execution is appropriate, jurisdictional questions "should be well fleshed out in advance and we believe that issues related to timeliness should be relatively easy to dispose of by the time they reach this court." Commonwealth v. Morris, 822 A.2d 684, 692 (Pa. 2003) ("Morris II") (emphasis added). In Morris II, the appellant asserted that he was entitled to an evidentiary hearing regarding witness compensation for testimony as part of a claim of governmental interference. Our Supreme Court rejected the appellant's claim because it was "speculative ... in the absence of any allegations tying the witnesses in a particular case to the District Attorney's policy of paying for their services." Id. at 699. Unlike the situation in Morris II, appellee's governmental interference claim as set forth in his March 9, 2012 petition and July 27, 2012 Amended Petition was based on averments which, if believed, would have constituted a sufficient basis upon which jurisdiction could have been rooted. This Court found that appellee's claim regarding the government's undue pressure on Draper created a "material issue of fact," and thus required an evidentiary hearing pursuant to Pa.R.Crim.P. 908(A)(2).

proceedings. From the time that Judge Savitt denied relief until the Third Circuit denied appellee's habeas corpus claims, the litigation had lasted for approximately 16 years. By the time the Third Circuit ruled, appellee had almost no avenue left and execution became a real possibility.

Nevertheless, the defense was still actively involved in its representation of appellee. The defense prepared a petition for a writ of *certiorari*, which it filed in the United States Supreme Court on December 13, 2011. While awaiting a decision from that Court, appellee's counsel approached Draper to see if the possibility of appellee's potential nearing execution would finally prompt him to speak with them.

Dating back to the time of trial, Draper had refused to speak with appellee's attorneys.[43] Appellee's attorneys again tried to speak with Draper on an occasion when he was at SCI-Graterford, which was from 1995-2006. N.T. 9/24/2012 (A.M.) at 35. Draper testified that he did not speak with appellee's representatives because, "I didn't want to speak on anything to anybody." N.T. 9/20/2012 (P.M.) at 210. Draper cited fear that the police would still charge him with the murder of Donna Friedman, as well as feelings of anger at himself as reasons for his self-imposed silence. Id. at 208; 211. This Court found Draper's explanations for having refused to communicate credible and therefore accepted them.

Thus, when appellee's attorneys visited Draper at SCI-Frackville in January 2012 as a "last ditch attempt," and told him that appellee was "about to be put to death," Draper decided to break his silence. Id. at 215. While testifying before this Court, Draper broke down crying, stating that "nobody wants to know that you a transformed person [sic].

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[43] Mr. Panarella testified at the post-trial motions hearing, "Mr. Draper would not discuss the case with my associate." N.T. 4/24/1987 at 7.

Nobody wants to know that what type of person you are now from when you was 18 [sic]. I'm 46 now." Id. at 216. This Court found credible Draper's reasoning for finally speaking up. It made sense. He talked about how maturity and his "relationship with the Lord" motivated him to speak because "if I call myself a Christian, right, and I live by faith, not by sight, and God loved me so much, then, you know, he blessed me so much that, you know, I have to share that blessing and I wouldn't want to see anybody put to death." Id.

"Diligence" is defined as "[a] continual effort to accomplish something"; "care; caution; the attention and care required from a person in a given situation."[44] Black's Law Dictionary (9th ed., 2009) ("diligence"). Considering appellee's "situation" as part of the "due diligence" calculation, this Court found it significant that there were a number of instances in which Draper rebuffed appellee's attorneys when they had sought to speak with him.[45] Additionally, even after the Third Circuit denied his habeas corpus petition in March 2011, appellee's counsel were busy pursuing relief on his ineffective assistance of counsel claim with the United States Supreme Court. Instead of waiting for the High Court to grant or deny *certiorari*, or for Governor Corbett to sign his execution warrant, appellee took action reasonably quickly after March 2011, to ensure that no stone had been left unturned.

As a result of Draper's two declarations, appellee filed the March 9, 2012 PCRA petition, which led to this Court's decision to grant an evidentiary hearing, to the discovery of the exculpatory documents, and thus ultimately to the underlying substantive Brady claim.

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[44] Black's Law Dictionary defines "due diligence" by referring to its entry for "diligence." Black's Law Dictionary, (9th ed., 2009) ("due diligence").

[45] In the context of Pa.R.Crim.P. 600 – the speedy trial rule – our courts have emphasized that due diligence must be determined on a case-by-case basis. "Due diligence does not require perfect vigilance and punctilious care, but rather a showing by the Commonwealth that a reasonable effort has been put forth." Commonwealth v. Hill, 736 A.2d 578, 588 (Pa. 1999) (emphasis added). A "punctilious care" standard would require that an individual renew efforts having been rebuffed multiple times. However, a "reasonable effort" standard allows for reliance on a representation that the evidence sought cannot be obtained.

This claim satisfies the 60-day provision of § 9545(b)(2), as it was formally filed from three to six days after the first date on which it could have been presented.[46] The evidence substantiating the current claim comes from the District Attorney's Office's files and the Philadelphia Police Department's files, which were opened on September 22, 2012 and September 25, 2012, respectively. Appellee then filed the Amendment and Supplement to his PCRA petition on September 28, 2012. Accordingly, this Court found that it had jurisdiction under §§ 9545(b)(1) and (2).

II. Not Previously Litigated; Not Waived

Appellee's claim is not "waived" under § 9544(b). A claim of error is waived if a party could have raised the issue at trial, on appeal, or in a prior post conviction proceeding but failed to do so. Commonwealth v. Peterkin, 649 A.2d 121, 124 (Pa. 1994). There was no prior proceeding in which appellee could have raised the claim that the government suppressed evidence that Draper had been pressured to call the crime a robbery-gone-wrong, or the claim that the government suppressed evidence of the victim's homosexual ephebophilia, as the latter evidence was uncovered in September 2012.

Nor is appellee's claim "previously litigated" under § 9544(a). A claim of error is "previously litigated" when either the "highest appellate court in which the appellee could have had review as a matter of right has ruled on the merits of the issue," or "it has been raised and decided in a proceeding collaterally attacking the conviction or sentence." 42

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[46] The Commonwealth argued that appellee should not be permitted to amend his PCRA petition to conform to the evidence produced at the evidentiary hearing because the documents uncovered during the evidentiary hearing did not constitute a meritorious Brady claim. N.T. 9/25/2012 at 61. This Court was cognizant of the significant interests that the Commonwealth had, and continues to have in this case as regards finality. These are also strong interests in the justice system as a whole and were noted by our Supreme Court in Morris II, as noted in FN 42, *supra*.. However, on balance, this Court found that appellee was entitled to amend pursuant to Pa.R.Crim.P. 905(a). Appellee's request to amend his petition, which was granted and constituted the basis for appellee's subsequent "Amendment and Supplement," distinguishes the procedural posture of this case from Commonwealth v. Porter, 35 A.3d 4 (Pa. 2012).

Pa.C.S. §§ 9544(a)(2), (3). None of the claims raised by appellee in his 1995 PCRA petition was based on the prosecution having suppressed Draper's statement to the government or evidence of the victim's homosexual proclivities towards teenage boys. Not until appellee amended his March 9, 2012 PCRA petition in light of the September 2012 evidentiary hearing has he raised the specific claim upon which relief was granted. Additionally, it would be impossible for a court to have ruled on the merits of appellee's current Brady claim, given that the evidence found in the government's files was uncovered in September 2012. The "merits" of the current issue revolve around whether or not the three prongs of Brady have been met, whereas the "merits" of the issues discussed in appellee's prior PCRA petition revolved around whether or not trial counsel was constitutionally ineffective.

Additionally, the nondisclosure of evidence – and the affirmative mistepresentation by the Commonwealth that such evidence did not exist, as noted *supra* – ensured that the issues about Amos Norwood's homosexual impropriety with boys was not "previously litigated."

III. Success on the Merits

Appellee demonstrated that the government "sanitized" the statements of two witnesses, Mamie Norwood and Reverend Charles Poindexter, removing information that either directly or indirectly demonstrated that the victim was a homosexual ephebophile. N.T. 9/25/2012 at 10-20; 39-40. Additionally, the prosecutor failed to disclose to defense counsel evidence in her possession, as well as in the Philadelphia Police Department's file, that the victim had made sexual advances on a teenage member of his church, and that there were other possible instances of sexual impropriety. N.T. 9/20/2012 (P.M.) at 121-24. With the suppressed evidence in hand, reasonable trial counsel could have pursued an alternate theory at the penalty phase, rooted in evidence that would have been admissible

during the guilt phase and bolstered during the penalty phase of trial. At the guilt phase, both Mamie Norwood and Reverend Poindexter testified that Amos Norwood was a kind church volunteer who spent his time helping underprivileged children. N.T. 1/14/1986 at 157-58; 166-67; 172-74. The information that each had previously provided to the government could have been used on cross-examination to directly contradict *their* characterizations of Mr. Norwood. And, at the penalty phase, a reasonable defense attorney could have called a witness like Ronald House to testify about his experience as a sexual target of Amos Norwood. Based on that evidence, reasonable trial counsel could have credibly argued that appellee was another one of Mr. Norwood's teenage sexual targets, ultimately bolstering appellee's case in mitigation and undermining confidence in the jury's death sentence. Without this evidence, appellee's counsel was given a skewed and incomplete picture of the victim which effectively tied his hands while the prosecution elicited testimony at trial about his kind and caring character, and then argued to the jury at the penalty phase that the victim's "kind" and "innocent" nature should be considered against appellee when determining whether to sentence him to death. This Court concluded that, if disclosed, the cumulative impact of this evidence would have enabled reasonable trial counsel to challenge, if not entirely to preclude, the government's sympathetic portrayal of the victim, while also explaining how Norwood's sexual advances amounted to a mitigating "circumstance of the offense" under 42 Pa.C.S. § 9711(e)(8).

Preliminarily, it is important to note that for evidence to qualify as Brady material, it must "involve the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." U.S. v. Agurs, 427 U.S. 97, 103 (1976). Prosecutors do not have to disclose apparently exculpatory evidence "where the parties had equal access to the information or if the defendant knew or could have uncovered such

evidence with reasonable diligence." Commonwealth v. Morris, 822 A.2d 684, 696 (Pa. 2003), *citing* Commonwealth v. Paddy, 800 A.2d 294, 305 (Pa. 2002). The "defense diligence" requirement of Brady has been addressed numerous times by the courts of our Commonwealth. See, e.g., Pursell, 724 A.2d at 305; Paddy, 800 A.2d at 305; Commonwealth v. Johnson, 863 A.2d 423, 426 (Pa. 2004); Commonwealth v. Crews, 863 A.2d 498, 502 (Pa. 2004). Throughout these cases, our Supreme Court has limited the prosecutor's duty under Brady, finding that prosecutors need not disclose "evidence" or "information" in the government's possession that the defendant knew or could have known. See, e.g., Johnson, 863 A.2d at 426 ("No Brady violation where the Appellant knew or could have uncovered the evidence at issue with reasonable diligence."). But that limitation is itself limited; when determining whether the defendant knew or could have known of the suppressed evidence, our courts focus on the *specific evidence* that the defendant claims has been suppressed, not on how that evidence would have been used at trial. When that evidence is either known or knowable to the defense, there is no Brady violation. Paddy, 800 A.2d at 305.

In Johnson, the defendant claimed that an affidavit written and signed by George Robles, a Commonwealth witness, was suppressed. The defendant argued that, as a result, impeachment evidence about Robles being a drug dealer who colluded with police was withheld. Johnson, 863 A.2d at 425. The defendant highlighted six aspects of Robles's affidavit as constituting Brady material. Our Supreme Court's response was narrowly tailored to each aspect of Robles's affidavit, and whether or not the defendant knew of that specific information at the time of trial. Id. at 426-27. Because the Court determined that the defendant either was aware, or could have become aware with reasonable due diligence, of the individual pieces of evidence/information, the Brady claim failed.

In Paddy, the defendant argued that, as part of an unrelated murder, police were investigating a suspect who had been described in the same unique way as the suspect in the case for which Paddy was charged with murder. Paddy argued that information should have been disclosed prior to trial. Paddy, 800 A.2d at 304. Our Supreme Court held that "the information allegedly withheld from the defense was published in Philadelphia's two major newspapers, the Philadelphia Inquirer and the Philadelphia Daily News, months before Paddy's second trial." Id. at 305. The fact that the evidence of this investigation was publicly available meant that it could not form the foundation of a Brady claim.

In Crews, the defendant claimed that the government withheld information about his own military records and his family background, history of mental illness and substance abuse. Our Supreme Court again focused on the precise evidence that the defendant claimed should have been turned over. "There is nothing which demonstrates appellant could not have supplied his family background information and military records himself [N]one of the information he cites was uniquely within the control of the prosecution." Crews, 863 A.2d at 502.

But where the suppressed evidence is unknown, even if it is part of a larger "theory" that includes evidence that *is* known to the defense, there may still be a Brady violation when the government suppresses that unknown evidence. Kyles, 514 U.S. at 429, 447-48. In Kyles, the defendant knew that the key Commonwealth witness, Beanie, planted incriminating evidence in his garbage. Id. at 429. Nevertheless, the United States Supreme Court held that an internal police memorandum calling for the seizure of Kyles' garbage based upon Beanie's suggestion was Brady material. Id. at 447-48. In other words, there was an additional "aspect" or "layer" to the evidence, about which the defendant did not know. Because that additional component to the evidence would have helped to round out

a "theory" favorable to the defendant, the Supreme Court found that it was one piece of suppressed evidence which, along with others, cumulatively undermined confidence in the outcome at trial. Id. at 448.

In Cone, the Supreme Court held that evidence crediting and corroborating a defense theory could be the additional "aspect" or "layer" to the evidence about which the defendant did not know, and which the government had suppressed. Cone, 556 U.S. at 470-71. Mr. Cone knew that he was under the influence of drugs and alcohol when he went on a crime spree. Id. at 474. However, he did not know that witnesses who had seen him several days before and after the murders described him to the police as "wild eyed" and that his behavior was "real weird." Id. at 459. The United States Supreme Court found that the suppressed statements "strengthen[ing] the inference" that Cone was impaired at the time of the crime could have amounted to a viable Brady claim so long as it was ultimately considered "material."[47] Id. at 475.

The Third Circuit recently applied that logic of Kyles and Cone in Simmons v. Beard, holding that, where suppressed evidence constitutes a crucial part of a larger "theory," the non-disclosure of *that* evidence can constitute a viable Brady claim. See Simmons v. Beard, 590 F.3d 223, 238 (3d Cir. 2009) ("Without the evidence suppressed by the prosecution, however, the defense could not credibly proffer such a theory. Had this information been available to the defense before trial, it could have much more effectively attacked the Commonwealth's case..."). Our Supreme Court also recently endorsed the principle that suppressed evidence comprising part of a defense theory – whether that theory

[47] The case was before the United States Supreme Court on a petition for a federal writ of habeas corpus after Mr. Cone had filed two unsuccessful state petitions for post-conviction relief. Cone, 556 U.S. at 461. The issue before the Supreme Court was whether a federal habeas claim is "procedurally defaulted" when it is twice presented to the state courts. After determining that the State's procedural objections "provide no obstacle to judicial review," the Court turned to the merits of the Brady claim. Id. at 469. Ultimately, the Court remanded the case to the District Court "with instructions to give full consideration to the merits of Cone's Brady claim." Id. at 476.

has been pursued *or* could *potentially* have been pursued – can substantiate a Brady claim, as long as that evidence is ultimately "material." Commonwealth v. Ly, 980 A.2d 61, 75 (Pa. 2009) ([T]he protection of Brady extends to the defendant's ability to investigate alternate defense theories and to formulate trial strategy.").

In Ly, three men who identified themselves as "gangsters" demanded that a restaurant owner in Philadelphia's Chinatown pay "protection money." Id. at 66. Soon after corralling three restaurant employees in the kitchen, one worker – Janice Wong (Janice) – escaped out of a side door. The three gangsters ran after her, and eventually the person she called "Second Man" grabbed her arm and turned her to face him in a well-lit street corner. Id. The three men returned Janice to the restaurant, where they found Jade Wong (Jade) on the phone with police. After taking several steps toward the dining area, Janice heard a gunshot, saw Jade bleeding from her head, and then saw Second Man backing out of the side door in the area she believed the shooter would have been. Id. Shortly after the murder, Janice identified Ah Thank Lee as the person she had labeled "First Man." Nearly two years later, on the same day that Janice identified Cam Ly (the appellant) as Second Man, she identified Wong Kin Fung, not Ah Thank Lee, as First Man. Id. at 66-67. The Commonwealth failed to disclose to Mr. Ly that Janice had made an inconsistent identification with respect to First Man. Our Supreme Court held that the government "improperly withheld" the conflicting identification because it could have substantiated an alternate defense theory for Mr. Ly: "it could have been used to question Janice Wong's identification of Appellant as the shooter, especially given the prosecution's attempt to bolster Janice Wong's identification of Appellant with her identification of Ah Thank Lee." Id. at 78. The Ly Court ultimately concluded that the non-disclosure of Janice's conflicting identifications of First Man did not prejudice Mr. Ly because the other evidence against him

was quite strong; she had seen him in a well-lit street corner and never wavered in her identification of him. Id. Under Ly, evidence substantiating an "alternate defense theory" may properly be considered the foundation of a Brady claim, so long as that withheld evidence is "material."[48]

Whereas Johnson, Paddy and Crews all involved information that was known/knowable to the defense, the precise information that the Commonwealth suppressed in the instant case was beyond the scope of appellee's knowledge. The evidence that the Commonwealth withheld was that Amos Norwood had engaged, or may have engaged, in inappropriate sexual behavior with other teenage boys in the past. Appellee

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[48] In Commonwealth v. Willis, 46 A.3d 648 (Pa. 2012), Madame Justice Todd's Opinion Announcing the Judgment of the Court ("OAJC") discussed the principle in Ly that "Brady applies not only to purely exculpatory evidence or to evidence which relates to the credibility of witnesses, but also to evidence which impacts a defendant's ability to investigate alternate defense theories and to formulate trial strategy," and stated that it extends to cover both admissible and inadmissible evidence. Id. at 669-70, *citing* Ly, 980 A.2d at 76. To support the notion that Brady applies to inadmissible evidence, Madame Justice Todd cited to Commonwealth v. Green, 640 A.2d 1242 (Pa. 1994). Mr. Chief Justice Castille wrote a forceful concurring opinion, disagreeing with the OAJC's reliance on Green, instead arguing Green was wrongly decided, as it was based entirely on speculation:

> Here is the Green Court's dispositive analysis: "knowledge of [the undisclosed, inadmissible evidence] certainly would have opened another avenue of investigation for the defense that may well have led to further exculpatory evidence. Had the defense been aware of Moser's statements, it may also have altered its trial strategy, especially in regards to appellant's decision not to testify . . . " There are no specifics in these "may haves." It is simply speculation upon speculation. No specific evidence is identified.

Willis, 46 A.3d 683 (Castille, C.J., concurring).

The Chief Justice then suggested that instead of allowing Brady material to include that which has a "possible effect[ ] upon 'defense preparation," he "would require that the derivative, admissible evidence be specifically identified with an explanation of why it is difference-making under the reasonable probability standard." Id. at 684.

As will be discussed in greater detail in the materiality section *infra*, the withheld evidence in the instant case is distinguishable from that which was suppressed in Willis. Unlike the suppressed statement in Willis, which was made by a co-defendant who would have pled the Fifth Amendment instead of testifying, rendering his prior out-of-court statement inadmissible hearsay, the statements crediting and corroborating appellee's account of inappropriate sexual activity with the victim would have been the backbone of an "alternate" defense theory, and *also* would have been admissible at trial. Therefore, it is possible to calculate the impact that such evidence would have had at the guilt and penalty phases of trial. Whereas in Ly, the impact of evidence supporting an alternate defense theory would not have been "material," this Court found that the evidence withheld in the instant case satisfied the prejudice inquiry because it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the [jury's] verdict" of death. Kyles, 514 U.S. at 435.

obviously would have known about prior sexual encounters that *he* had had with Mr. Norwood.[49] But evidence that Mr. Norwood touched Ronald House's genitals, that Reverend Poindexter had received at least one complaint about a specific instance in which Mr. Norwood was sexually inappropriate with a teenage male, and that Mr. Norwood's wife awoke in the middle of the night as her husband left the house with a "young male, slim" and later related a bizarre story to her, was undoubtedly beyond the scope of appellee's conceivable knowledge.

Additionally, any sexual encounter appellee may have had with Mr. Norwood is critically different from the evidence that the government suppressed.[50] The suppressed

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[49] Two pieces of evidence from trial suggest that appellee told Ronald Rucker and Draper something about a prior sexual encounter that he had had with Mr. Norwood. In Mr. Rucker's July 18, 1984 statement to police, he noted that, "Terry said Amos was a homosexual and was the type to pay people." Two days later, Draper told police that, while appellee was retrieving tools from the car with which the murder would eventually be committed, Draper asked Mr. Norwood, "So you like boys?" to which Mr. Norwood responded, "Yes." Additionally, Dr. David Lisak interviewed appellee on January 11, 2012, January 27, 2012 and February 29, 2012 for a total of approximately 12 hours. Following these interviews, Dr. Lisak wrote that appellee gave him a detailed account of how his sexual relationship with Mr. Norwood began, and how during their multiple sexual encounters, violence had erupted on previous occasions. Appendix to Petition for Post-Conviction Relief, 7/16/2012 at Table 12. Due to the posture of the proceedings before this Court, this Court did not hear testimony from Dr. David Lisak, and no one has heard testimony from appellee regarding sexual encounters between him and Mr. Norwood. There has thus been no opportunity for their credibility to have been determined.

[50] Had evidence that Mr. Norwood was sexually involved with other teenage boys been disclosed, it would have corroborated and credited appellee's own experience. As noted *supra*, appellee had never testified as to his own experience with Mr. Norwood or others, although there was certainly information from other witnesses – some of whom were called by the Commonwealth at his two trials – about his having been sexually active with older males from a young age. This Court has certainly seen in recent years and in cases of such high publicity as the recent Jerry Sandusky trial that young male victims of older male sexual abuse typically do not report such behavior and find it extremely difficult and painful to talk about it.

At trial, appellee testified that, on the night of the killing, a friend, Michael Hopkins, introduced him to Amos Norwood for the first time. N.T. 1/27/1986 at 1178-79. The fact that appellee's trial testimony is inconsistent with the argument that would flow from the suppressed evidence is not dispositive of whether the prosecutor had a duty to disclose such evidence under Brady. As stated *supra*, in Ly, our Supreme Court held that evidence supporting an alternate defense theory was "improperly withheld" after recognizing how the withheld evidence specifically could have been used at trial. Ly, 980 A.2d at 78. The fact that "a defendant may predicate a Brady claim upon prosecutorial suppression that causes the defendant to 'abandon lines of independent investigation, defenses, or trial strategies that [he] otherwise would have pursued,'" means that appellee's trial testimony that he only met Mr. Norwood the night of the murder does not spoil the instant claim. Maynard v. Gov't of the Virgin Islands, 392 Fed. Appx. 105 (3d Cir. 2010) (non-precedential opinion), *citing* U.S. v. Bagley, 473 U.S. 667, 683 (1985) (Blackmun, J., concurring). Had the prosecution disclosed evidence of Mr. Norwood's homosexual ephebophilia in a timely fashion, a reasonable defense attorney could have pursued a penalty-phase strategy

evidence would have allowed reasonable trial counsel to argue that Mr. Norwood was not in control of his impulses. And it would have afforded appellee the opportunity to compare himself to other young victims – whether he testified or not – in contrast to the prosecution's portrayal of him during the penalty-phase closing argument as a cold, calculating killer.[51] But without the suppressed evidence of specific instances of Mr. Norwood's sexual improprieties with other teenagers, any allegation or insinuation from appellee that he had a sexual encounter with Mr. Norwood, which in turn played a role in the commission of the crime, would have merely seemed like an attempt by appellee to sling mud on the victim's character. In other words, that theory would have been incredible. Armed with the complete picture of Mr. Norwood's ephebophilia, appellee "could have much more effectively attacked the Commonwealth's case" at the penalty phase.[52] Simmons, 590 F.3d at 238.

(FN cont'd...) centered around Mr. Norwood's sexual improprieties with teenage boys, and how that was a "circumstance of [appellee's] offense" under 42 Pa.C.S. § 9711(e)(8).

[51] During her closing argument at the penalty phase, Ms. Foulkes stated:

> He has taken two lives, two innocent lives of persons who were older and perhaps unable certainly to defend themselves against the violence that he inflicted upon them. He thought of no one but himself, and ***he had no reason*** to commit these crimes. He would have gone on committing those crimes had our system of justice not stopped him. I am asking you, ladies and gentlemen, to impose the death penalty because our system of justice must stop him. He must be stopped.

N.T. 2/3/1986 at 1876-77 (emphasis added).

[52] In Commonwealth v. Martin, a capital case, a 74-year old homosexual male, Guy Goodman, had written, called and visited the defendant while he served a sentence at the Lebanon County Correctional Facility. 5 A.3d 177, 180 (Pa. 2010). The defendant was given permission to leave the prison for two hours. Along with a conspirator, he took that time to go to the home of Mr. Goodman, who propositioned the defendant for sex in exchange for money. The defendant responded by striking the man in the head with a vase, and then duct-taped a plastic bag over Mr. Goodman's head, stole his property and left him to die. Id. at 181. Our Supreme Court concluded that trial counsel had been ineffective for failing to present evidence at the penalty phase that the defendant had been treated for mental disorders arising from sexual abuse by his own uncle, as it would have supported mitigating factors §§ 9711(e)(2), (3). Id. at 203. The Martin Court's conclusion that counsel was ineffective for failing to present that evidence was grounded in the notion that evidence tending to establish an illicit relationship between the victim and the defendant is relevant for mitigation. Id. at 202 (finding that the defendant's history of sexual abuse and "the sexual advances the male victim made to Martin immediately prior to the murder placed Martin under the influence of extreme mental or emotional disturbance

Brady Components

There are three essential components that appellee must demonstrate in order to establish a Brady violation: (1) the evidence was favorable to the accused, either because it is exculpatory or because it is impeaching, (2) the evidence was suppressed by the Commonwealth, either willfully or inadvertently, and (3) the evidence was material, in that its omission resulted in prejudice to the accused. Strickler v. Greene, 527 U.S. 263, 281-82 (1999); Commonwealth v. Dennis, 17 A.3d 297, 308 (Pa. 2011) (reversing the order of the first and second elements).

1. "Essential Component" of Brady #1

The first "essential component of a Brady violation" requires that the evidence at issue be admissible, relevant to the jury's decision, and "favorable to the accused because it is exculpatory or because it is impeaching." Strickler, 527 U.S. at 281-82.

In the instant case, the suppressed evidence could have played a role at trial to impeach the testimony of Mamie Norwood and of Reverend Poindexter, and its absence was relied upon by the trial prosecutor for her penalty-phase closing argument. The information eliminated from the respective statements of Mamie Norwood and Reverend Poindexter would have allowed a reasonable defense attorney to impeach them after they testified to the following:

(a) Mamie Norwood:

> ADA FOULKES: You had indicated, in response to questions by the defense attorney, that your husband didn't pick up strangers. Did your husband have occasion to take young people back and forth from time to time in his car?
> MAMIE NORWOOD: The ones that he worked with, yes, that I knew.
> ADA FOULKES: How much of his time would you say, if you know, how often would he do that? Often? Rarely? Middle?
> MAMIE NORWOOD: It would be every week at some point.

(FN cont'd...) at the time of the murder," a mitigating factor). The fact that the evidence probative of such a relationship is circumstantial – as the suppressed evidence was in this case – does not make it less relevant.

ADA FOULKES: And then from time to time, he would chauffeur young people from one point to another; would he not?
MAMIE NORWOOD: The ones that I know he works with, yes.
ADA FOULKES: When he would do that, would he take those young people home?
MAMIE NORWOOD: Yes.

ADA FOULKES: From time to time, did you ever see evidence of that chauffeuring process by things left in your car?
MAMIE NORWOOD: Yes, sometimes.

N.T. 1/14/1986 at 157-58.

(b) Reverend Charles Poindexter[53]:

ADA FOULKES: Did Mr. Norwood have any special responsibility in the church regarding youth?
REV. CHARLES POINDEXTER: Yes, he did.
ADA FOULKES: What were those responsibilities?
REV CHARLES POINDEXTER: He was warden for many years of the acolytes or the service of the church, and he was in charge, he was the founder and in charge of what we called the Youth Theater Fellowship which dealt with youth between the ages of seven and eighteen.
ADA FOULKES: Were there occasions, Reverend, in connection with his duties, where Mr. Norwood would come to the church in the night hours to fulfill some of these duties?
REV. CHARLES POINDEXTER: Yes, there were.
ADA FOULKES: Also, in your contact with Mr. Norwood, did you observe him from time to time transport young people from the church activities to their homes or other locations?
REV. CHARLES POINDEXTER: Frequently.

N.T. 1/14/1986 at 166-67.

[Re-direct]

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[53] In its Motion to Dismiss, the Commonwealth acknowledged that Reverend Poindexter's trial testimony was devoid of any reference to Amos Norwood's homosexual ephebophilia:

> Reverend Poindexter did not remotely suggest any of this [impropriety about Amos Norwood] in his testimony at defendant's 1986 trial. In September 1984, Reverend Poindexter reported to *The Inquirer* that the victim "devoted his life almost entirely to working with young people." Reverend Poindexter further commented that St. Luke's had been packed with more than 1,000 mourners at each of two funeral services for the victim and that his ashes were buried in the church yard. See *Philadelphia Inquirer* Article entitled, "When a Model Teenager is Accused of Murder, dated Sept. 6, 1984

Commonwealth Motion to Dismiss, 9/7/2012, at 32.

ADA FOULKES: Reverend, from time to time, do the church activities extend beyond the people who are parishioners and members of the church?
REV. CHARLES POINDEXTER: Yes, they do.

[*Re-cross*]

MR. PANARELLA: Certainly, church activities or functions are for church members; is that correct?
REV. CHARLES POINDEXTER: Well, the activities that Mr. Norwood participated in very often involve young people outside of our parish congregation. In fact, many who are now active came in as a result of that kind of inclusion.
MR. PANARELLA: And that would occur at organized functions; is that correct?
REV. CHARLES POINDEXTER: Not necessarily. Sometimes they were simply trip services where they were invited to participate.
MR. PANARELLA: There were no church services occurring late in the evening on June 11th; were there?
REV. CHARLES POINDEXTER: Oh, no, of course not.
MR. PANARELLA: And there is nothing of any youth activities or anything of that nature that was going to take place at your church at that time; correct?
REV. CHARLES POINDEXTER: No.
MR. PANARELLA: So when you make reference to unusual or that it would not be unusual to have non-church members come to church functions, it would have been extremely unusual to have a non-parishioner at the church when no church functions were going on?
REV. CHARLES POINDEXTER: No, it would not have been.
MS. FOULKES: Objection.
THE COURT: Overruled.
REV. CHARLES POINDEXTER: No, it would not have been.
MR. PANARELLA: It would not have been unusual to have a non-church member at a non-church function late at night when the church wasn't open to the public?
REV. CHARLES POINDEXTER: No.
MR. PANARELLA: That's correct?
REV. CHARLES POINDEXTER: Would you like me to explain?
MR. PANARELLA: Yes.
REV. CHARLES POINDEXTER: Very often, Mr. Norwood had friends of some of the young people to help with the building of the sets for the plays and, quite often, I saw him with young people or the people who were working with him people that I never knew before.
MR. PANARELLA: Again, you never knew Mr. Williams?
REV. CHARLES POINDEXTER: I never knew Mr. Williams.
MR. PANARELLA: Or Mr. Draper?
REV. CHARLES POINDEXTER: No.
MR. PANARELLA: Now, you were aware, were you not, that Mr. Norwood had some problem in the past?
REV. CHARLES POINDEXTER: Some problem?
ADA FOULKES: Objection, Your Honor.

> THE COURT: Just a moment. I am going to sustain it. I don't know quite what it is or how it is related to the circumstances here, so I will have to sustain the objection at this time.
> MR. PANARELLA: I have nothing further.

Id. at 172-74.

Reasonable defense counsel, having had this evidence prior to trial, would have pursued an alternate strategy in the defense case-in-chief. Though the decision to testify in one's defense is a decision that a defendant must make for himself/herself, defense attorneys have a responsibility to advise their clients about that decision. See Commonwealth v. Carson, 741 A.2d 686, 689 (Pa. 1999) ("It is well settled that the decision to testify on one's behalf is ultimately to be made by the defendant after full consultation with counsel."). With the withheld evidence of Norwood's sexual improprieties with other teenage boys in hand, thereby strengthening the inference that appellee had been sexually exploited by a man almost 40 years his elder, reasonable defense counsel could have attempted to convince his client to stay off the stand. Non-disclosure adversely affected trial counsel's preparation, as consulting with one's client – and being able to discuss the implications of all of the evidence, and particularly of the exculpatory evidence – is a staple of trial preparation.

Had the information in the police activity sheet, containing the full statements of both Reverend Poindexter and Mamie Norwood, been included in the statements which were turned over in discovery, it could have been used by a reasonable defense attorney to properly cross-examine both witnesses where they characterized Mr. Norwood as a kind church volunteer who wanted to help out the kids of the neighborhood. When Mamie Norwood testified that her husband only chauffeured young people that he knew from the church, the Commonwealth "opened the door" to her being cross-examined about her knowledge of Mr. Norwood bringing a young, slim male into their home before driving away with that young man in his car and not returning until the next morning. Likewise, when

Reverend Poindexter testified that Mr. Norwood spent a great deal of time with the acolytes and young people building sets for the church's youth theater group, the Commonwealth "opened the door" to cross-examination about Reverend Poindexter's knowledge that Mr. Norwood had been sexually inappropriate with parishioners.

In addition to the cross-examinations of Mamie Norwood and Reverend Poindexter during the trial, reasonable defense counsel would have called Ronald House to testify during the penalty phase to further flesh out the circumstantial evidence demonstrating that Mr. Norwood was a homosexual ephebophile.[34] Even if appellee never testified about experiencing Mr. Norwood's sexual improprieties, this collection of evidence would have been a sufficient basis upon which a reasonable defense attorney could have vigorously attacked Ms. Foulkes' penalty-phase characterization of the victim as "innocent," and argued during his/her penalty phase closing argument that Mr. Norwood had victimized appellee just as he had done to others, and that those sexual advances had impaired appellee's judgment on the night of the murder.

Facts which strengthen the inference that Mr. Norwood made sexual advances on appellee significantly color "the circumstances of the offense," adding another dimension crucial to making a truly "individualized assessment" and imposing a sentence that "should reflect a reasoned *moral* response to the defendant's background, character, and crime." California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original). A reasonable defense attorney would have highlighted how Mr. Norwood's

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[34] Ronald House's testimony that Mr. Norwood attempted to take advantage of him sexually when the two were alone would have been admissible at the penalty phase in 1986, just as it would be admissible today. Pa.R.E. 401 codified the definition of relevance set forth in Commonwealth v. Scott, 389 A.2d 79, 82 (Pa. 1978): "Evidence which tends to establish some fact material to the case, or which tends to make a fact at issue more or less probable, is relevant." Evidence that Mr. Norwood had sexually inappropriate relationships with underage males tends to establish the fact that he also had a sexually inappropriate relationship with appellee.

pattern of impropriety was a "circumstance of [this] offense,"[55] offering a reason to view appellee through a mitigating lens. Having established that there is "some" evidence of a mitigating circumstance, a trial judge "shall" instruct the jury on that mitigating circumstance. 42 Pa.C.S. § 9711(c)(1)(ii). When viewed in combination with the details of the crime, evidence of Mr. Norwood's prior improprieties would cast this offense in an entirely different light; the withheld evidence credits and corroborates appellee's own account of having been victimized by Mr. Norwood.[56] Thus, the first essential component – that the withheld evidence was favorable to the accused – has been established.

2. "Essential Component" of Brady #2

The second "essential component of a Brady violation" requires that the evidence at issue be "suppressed by the government, either willfully or inadvertently." Strickler, 527 U.S. at 282. Evidence, whether in the possession of the prosecution or the police, is subject to the Brady duty to disclose. In order to comply with Brady, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." Kyles, 514 U.S. at 437. For over a decade, our Supreme Court has endorsed that same principle. Commonwealth v. Burke, 781 A.2d 1136, 1142 n.5 (Pa. 2001) (finding it immaterial that a prosecutor was unaware of relevant statements in police files, given that "[t]his Court cannot ignore the obvious implications of Kyles."); Commonwealth v. Gibson, 951 A.2d 1110, 1127 (Pa. 2008) ("The prosecution's duty under Brady incorporates disclosure of all exculpatory evidence, regardless of whether the defense specifically requests such materials, and extends to evidence in the possession of

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[55] 42 Pa.C.S. § 9711(e)(8).

[56] For a full discussion of how the withheld evidence would have altered the jury's perception of the "details of the crime," see the "materiality" section *infra*, p. 50-51.

police agencies of the same government bringing the prosecution.") (internal citations omitted).[37]

In Brady, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment *irrespective of the good faith or bad faith of the prosecution.*" Brady, 373 U.S. at 87 (emphasis added). Though the prosecutor's intent is unimportant in a pure Brady analysis, Pennsylvania courts have found that prosecutorial "gamesmanship" amounting to a violation of discovery rules can be an independent reason to shape a remedy for a defendant where such gamesmanship prejudices the defendant in his ability to present a defense. Commonwealth v. Moose, 602 A.2d 1265, 1273-75 (Pa. 1992) (finding that where the prosecutor hid a statement from defense counsel and told the court that "all available evidence had been provided" required that a new trial be granted because it prejudiced the defendant and otherwise, the court "would be condoning and encouraging such last minute disclosures and gamesmanship."). The Moose Court relied on Commonwealth v. Thiel, 470 A.2d 145, 149 (Pa.Super. 1983), where the Superior Court fashioned a remedy for a defendant after the government withheld information that should have been disclosed under Pa.R.Crim.P. 305(B)(1)(f). The Thiel Court referred to Pa.R.Crim.P. 305(E), which "gives the trial court broad discretion in formulating remedies for a failure to comply with discovery requirements," as the foundation for its decision to grant a new trial. In both Thiel and Moose, the courts of our Commonwealth found that the proper remedy for

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[37] There is no dispute that the Philadelphia District Attorney's Office and the Philadelphia Police Department are part of the "same government." Ms. Foulkes' handwritten note about Ronald House being touched on his genitals and hearing of other possible incidents of sexual abuse was found in the District Attorney's Office trial box for the Norwood case. (See Attachment D, which was marked as Court-2 in the PCRA hearing before this Court.) The June 1984 activity sheet, which detailed the complete versions of the Poindexter and Norwood interviews, was found in the H-84-127 police box. (See Attachment E, which was marked as P-24 in the PCRA hearing before this Court.) Under Kyles and Burke, all of this evidence is properly considered to be within the scope of the prosecutor's control.

prosecutorial "gamesmanship" which violated the rules of discovery and highly prejudiced the defendant was a new trial; here, this Court found that the proper remedy was a new penalty phase.[58]

The "sanitization" of the statements turned over to defense counsel, and the non-disclosure of the information contained in Ms. Foulkes' handwritten notes demonstrates that evidence was plainly "suppressed." That suffices to establish the second prong of a Brady violation.

3. "Essential Component" of Brady #3

The third and final "essential component of a Brady violation" requires that "prejudice ... ensued." Strickler, 527 U.S. at 282. "Prejudice" in this context is defined by the concept of "materiality." For suppressed evidence to be considered "material," there must be a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In other words, favorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.'"[59] Cone v. Bell, 556 U.S. 449, 470 (2009), *citing* Kyles, 514 U.S. at 435.

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[58] See the Appendix for this Court's detailed findings.

[59] In its October 2, 2012 filing in the Supreme Court, the Commonwealth argued that the Supreme Court has already decided that, had evidence from the 1998 PCRA hearing been presented to the jury, the jury would still have voted for death rather than life: "That 'evidence' pales in comparison to the evidence before this Court in the prior appeal – evidence from witnesses who claimed that defendant himself was abused by the victim. This Court ruled such evidence insufficient to change the sentencing verdict." Commonwealth's Reply to Defendant's Response to Emergency Application to Lift Illegal Stay of Execution, 10/2/2012 at 12-13.

In fact, the Supreme Court's 2004 opinion did not rule that evidence of the victim's homosexual ephebophilia and its potential impact on appellee was insufficient to change the sentencing verdict. Our Supreme Court divided the evidence appellee put forth about counsel's ineffectiveness at trial into three different categories. The Court's review of "the prejudice prong of the ineffectiveness inquiry," which is "in terms of whether 'there is a reasonable probability that at least one juror would have struck a different balance,'" practically was limited to the evidence that appellee claimed trial counsel should have presented. Wiggins v. Smith, 539 U.S. 510, 537 (2003). Writing for the majority, Mr. Justice Eakin first affirmed Judge Savitt's decision that trial counsel was not ineffective for failing to rely on Dr. Edwin P. Camiel's 1985 presentence report given that the report gave "no indication of petitioner's mental impairment at the time of the murder." Williams II, 863 A.2d at 520. The

> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to . . reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice.

Brady, 373 U.S. at 87-88.

When undertaking the "materiality" analysis, the Court in Kyles echoed that "[f]our aspects of materiality under *Bagley* bear emphasis" to help guide the determination. Kyles, 514 U.S. at 434. The fourth aspect is particularly relevant to this case: "materiality is to be judged by reference to the "suppressed evidence considered collectively, not item-by-item" with the focus on the "cumulative effect of suppression." Kyles, 514 U.S. at 437; Ly, 980 A.2d at 84. Practically, courts analyze the "cumulative effect of suppression" through two inquiries: whether suppression negatively impacted the defense's case, and whether the government took advantage of the fact that evidence favorable to the accused was withheld.

In U.S. v. Perdomo, the Third Circuit measured the impact of suppression on the defense's case by considering the "possible effects of non-disclosure on the defense's trial preparation," and by asking whether had that evidence been "*disclosed and used effectively*, it may make the difference between conviction and acquittal." 929 F.2d 967, 971-72 (3d Cir. 1991)

(FN cont'd...) Court then affirmed Judge Savitt's conclusion that trial counsel was not ineffective for failing to present witnesses who could have testified to appellee's abusive childhood. Id. at 519-21. Lastly, the Court endorsed Judge Savitt's conclusion that trial counsel was not ineffective for failing to present mental health experts on appellee's behalf. Id. When upholding Judge Savitt's decision that appellee failed to demonstrate a reasonable probability that the introduction of mental health expert testimony would have undermined confidence in the verdict, Mr. Justice Eakin deferred to Judge Savitt's determinations in weighing the evidence: "Accordingly, we perceive no abuse of discretion by the PCRA court in weighing the evidence, and we will not disturb the court's determination." Williams II, 863 A.2d at 520.

But, as noted *supra*, after the Commonwealth confirmed Judge Savitt's incomplete understanding of the evidence that "there is nothing in the case involving Norwood's homosexuality or violation of young boys," Judge Savitt dismissed the impact that such information would have had when he engaged in weighing the testimony. N.T. 4/8/1998 at 158-59, 181-82; N.T. 4/9/1998 at 360-61; N.T. 4/13/1998 at 597-605. In other words, Judge Savitt found that any evidence of Amos Norwood's homosexual impropriety was not worthy of consideration in light of the Commonwealth's misrepresentation that it did not exist. Accordingly, neither Judge Savitt nor our Supreme Court has ever had occasion to address whether or not there is a reasonable probability that, had reasonable trial counsel presented to the jury the suppressed evidence of Amos Norwood's sexual improprieties with teenage boys, such evidence would have undermined confidence in the verdict at the penalty phase.

(emphasis in original). In that case, the government unknowingly misrepresented to the defense that its key witness did not have a criminal history, despite that witness in fact having two prior convictions. Id. at 970-72. "Such information would have been critical in presenting the witness' mental state, demeanor and behavior to the jury, and in questioning the witness' credibility." Id. at 972. The Perdomo Court stressed that the impact of suppression on the testimony that the defense "would have been able to elicit" was magnified by the government's misrepresentation, which misleadingly induced defense counsel into believing that the witness could not be impeached. Id. The cumulative impact of suppression presented an "undisputable argument that a Brady violation occurred." Id. at 974.

While the Perdomo Court tackled the "materiality" question from the perspective of how suppression impacted the defense's case, a number of other cases have emphasized that evidence is more likely to be considered "material" when the government seizes upon and exploits the presence (or absence) of the suppressed evidence. The Kyles Court considered the "word of the prosecutor" relevant to the materiality computation. The United States Supreme Court found impeachment evidence of two witnesses to be material in part because that evidence contradicted the argument set forth by the prosecutor during closing arguments. Kyles, 514 U.S. at 444 ("The likely damage is best understood by taking the word of the prosecutor, who contended during closing arguments that Smallwood and Williams were the State's two best witnesses."). In Banks v. Dretke, as part of its "materiality" or "prejudice" analysis under Brady, the Supreme Court echoed that a prosecutor's comments may be relevant.[40] The fact that a prosecutor exploits the absence of

[40] Though Banks discussed whether or not there was a violation of the due process right to a fair trial for the prosecution's failure to correct false testimony, the Supreme Court explicitly stated that it granted relief under Brady, and did not reach the issue as to whether or not relief was merited under Giglio v U.S., 405 U.S. 150

suppressed evidence during its penalty phase closing argument – as the trial prosecutor did here – is another reason to consider the suppressed evidence "material":

> Regarding "prejudice," the contrast between Strickler and Banks's case is marked. . . Most tellingly, the witness' testimony in Strickler "did not relate to [the defendant's] eligibility for the death sentence"; it "was not relied upon by the prosecution at all during its closing argument at the penalty phase." In contrast, Farr's testimony was the centerpiece of Banks's prosecution penalty-phase case.

Banks, 540 U.S. at 700-01 (citations omitted).

Recently, the Third Circuit blended both components of the materiality inquiry into one "overall" analysis. The Simmons Court engaged in the "materiality" analysis by contrasting the picture that trial counsel would have presented had the suppressed evidence been disclosed against "what actually happened" at trial. Simmons, 590 F.3d at 238.

> Overall, the picture of what Simmons's trial would have been like had these four *Brady* violations not occurred is vastly different from what actually happened. The two key witnesses presented by the state would have been substantially less credible, thus undermining the main evidence implicating Simmons in Knaze's death and Cobaugh's assault. Therefore, we agree with the District Court and hold that, cumulatively, the Commonwealth's *Brady* violations leave us without confidence in Simmons's conviction.

Id. at 238-39.

Thus, it was particularly helpful to this Court, in assessing materiality, to compare the evidence in the government's possession against that which was given to appellee's counsel in discovery.[61] See Dennis, 17 A.3d at 309 ("A reviewing court is not to review the evidence in isolation, but, rather, the omission is to be evaluated in the context of the entire record.").

(i) A June 1984 police activity sheet revealed that the police learned during a June 22, 1984 interview with Reverend Charles Poindexter that the victim

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(FN cont'd...) (1972). 540 U.S. at 690 n.11 ("Because we conclude that Banks qualifies for relief under Brady, we need not decide whether a Giglio claim, to warrant adjudication, must be separately pleaded.").

[61] A November 15, 1984 letter from Arnold H. Gordon, Esquire, Chief of Homicide Unit to Nicholas Panarella listed the discovery – other than the Medical Examiner's report, which was sent under separate cover – that was passed upon Mr. Panarella's request. (See the first two pages only of Attachment F, marked Exhibit C-2 in the PCRA hearing before this Court).

"may have been a homosexual," and that Reverend Poindexter had "in fact received a complaint about five years ago from the mother of a 17 year old parishioner that deceased had propositioned the 17 year old for sex, (male)." Additionally, the activity sheet notes that Reverend Poindexter "added that deceased had worked with juvenile males in the parish for years, doing counciling [sic] work for disturbed males, and males with family problems." (See Attachment E, which was marked P-24 in the PCRA hearing before this Court, page 1). However, the version of the June 22, 1984 interview that the prosecution turned over to the defense omitted those portions of Rev. Poindexter's statement entirely. (See Attachment G, which was marked C-2 in the PCRA hearing before this Court, item 19).

(ii) The same June 1984 police activity sheet also revealed that the police learned that Mamie Norwood had told them about a time in which she awoke at 2 AM to find a "young male, slim," standing silently in the hallway of her home. Mrs. Norwood explained to police that her husband woke her to ask her for money. She then watched as her husband loaded some stereo equipment into his car, and then he got in and drove off with the young man. Mrs. Norwood said that her husband returned home around 9-10 AM the next day and told her a "rambling" story about being "abducted," but that he was able to "escape" after using "psychology" on the captors "until they fell asleep." Mrs. Norwood remembered that he pleaded with her not to get the police involved. Additionally, Mrs. Norwood's eldest daughter was present during the interview, "but made

no comment on her belief in the veracity of the story." (See Attachment E, which was marked P-24 in the PCRA hearing before this Court, page 2). However, the version of Mrs. Norwood's statement turned over to the defense omitted this portion of her statement entirely. (See Attachment F, which was marked C-2 in the PCRA hearing before this Court, item 17).

(iii) A handwritten note by Assistant District Attorney Andrea Foulkes in the District Attorney's Office's file for the Norwood matter recounted evidence of a specific instance of Amos Norwood's homosexual ephebophilia. She wrote the name of the young man, "Ronald House," "touched on privates," and that he "heard about other possible incidents." (See Attachment D, which was marked Court-2 in the PCRA hearing before this Court). However, none of that information was turned over to the defense.

Without the evidence in hand that explicitly or inferentially connected Amos Norwood to acts of homosexual ephebophilia, the information that was actually provided to the defense created the false impression that references to Amos Norwood's homosexuality and alleged "kidnapping" had nothing to do with who he really was or with the case.[42] The government did disclose Jesse Lofton's and William Scott's statements, both of which

[42] The version of Reverend Poindexter's statement turned over to the defense mentioned the supposed "kidnapping." In the statement disclosed to the defense, Reverend Poindexter speculated that the kidnapping had something to do with "drugs" because Mr. Norwood worked as a chemist in New Jersey. Reverend Poindexter thought the incident was reported to the police. He was generally unclear as to what really happened. (See Attachment G, which was marked C-2 in the PCRA hearing before this Court, item 19). The fact that there was a clear version of this story from the one person who was an eyewitness and would actually know what happened – Mamie Norwood – goes to show that the defense was given a misleading, confusing picture based on the speculation of others.

included one question as to the interviewee's possible knowledge regarding Amos Norwood being homosexual. Both interviewees answered in the negative.[63]

Without the evidence above, the defense had two pieces of information suggesting that Mr. Norwood was a homosexual: Ronald Rucker's statement that "Terry said Amos was a homosexual and was the type to pay people,"[64] and Draper's statement that, shortly before killing Mr. Norwood, appellee "was going to tell [Mamie Norwood] that Amos was gay. He wanted to extort money from him, but she did not pay no [sic] attention to him, she just kept walking to the house."[65] And the defense had one nebulous piece of information suggesting that Mr. Norwood was an ephebophile – Draper's statement that when he was alone with the victim in the cemetery, he asked Mr. Norwood, "So you like boys?" to which Mr. Norwood responded, "Yea."[66]

In two different places during her penalty-phase closing argument, the trial prosecutor's comments about appellee's motive for the commission of this crime could have been effectively rebutted – or precluded – had the suppressed evidence been disclosed. First, she said:

> Now ladies and gentlemen, you know the horrible circumstances of the death of Amos Norwood. You know that the defendant, Terrance Williams, for no other reason but that a kind man offered him a ride home, that he and another man tied him up in the darkness of a cemetery, and beat him to death, squashed him like a bug that you might be irritated with against a windshield, beat him with two blunt instruments.

N.T. 2/3/1986 at 1873.

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[63] See Attachments L (page 2) and M (page 3), marked C-2 in the PCRA hearing before this Court, referring to items 13 and 24, respectively.

[64] See Attachment N, which was marked P-10 in the PCRA hearing before this Court.

[65] See Attachment O, which was marked P-2 in the PCRA hearing before this Court.

[66] Id.

Shortly thereafter, the trial prosecutor concluded, "He has taken two lives, two innocent lives of persons who were older and perhaps unable certainly to defend themselves against the violence that he inflicted upon them. He thought of no one but himself, and he had no reason to commit these crimes." Id. at 1876-77.

However, as someone who had the privilege of viewing the suppressed evidence in the government's possession collectively during the kind of trial preparation in which reasonable defense counsel would also have engaged, Ms. Foulkes admitted at the PCRA hearing before this Court, "Did I suspect that there was a sexual connection between them? Yes I did." When this Court asked her, "so maybe [Williams] is doing Norwood and getting money?" she responded, "No. Of course it occurred to me . . ." N.T. 9/20/2012 (P.M.) at 109-10. Ms. Foulkes stated "of course" she felt that there was a homosexual relationship between appellee and Norwood because she was able to connect all the dots. Without access to that same evidence, defense counsel was misleadingly induced into accepting the characterizations of Norwood that were included in the discovery packet, such as William Scott's statement that Norwood was "one of the straightest persons as far as I knew." (See Attachment M). Had evidence of Norwood's sexual proclivities for teenage boys been "*disclosed and used effectively*,"[67] a reasonable defense attorney could have drawn the jury's attention to such evidence during the penalty phase, enabling the jury to connect the dots about a man in his mid-50s having a sexual relationship with yet another teenage boy.

Instead of having the trial prosecutor rebut her own penalty-phase closing argument more than 26 years after delivering it, had she disclosed the suppressed evidence, a reasonable defense attorney would have been able to directly contradict or prevent her argument that day. Not only would reasonable defense counsel have directly rebutted the

[67] Perdomo, 929 F.2d at 972.

centerpiece of the Commonwealth's penalty-phase closing argument – that appellee killed Amos Norwood "for no other reason but that a kind man offered him a ride home"[48] – but that attorney would have then explained how the sexual pressure imposed on appellee by Norwood was a "circumstance of his offense," as it clouded his judgment. The United States Supreme Court suggested in Cone there was a reasonable probability that, had the suppressed evidence crediting and corroborating an explanation for a defendant's aberrant behavior been disclosed, the result of the proceeding at the penalty phase would have been different. Cone, 556 U.S. at 470. Under Tennessee law, evidence tending to establish that a defendant's judgment was "substantially affected" is relevant to a jury's consideration as to whether death is the appropriate sentence. Id. at 456 n.3. Though the Supreme Court found that it would be inappropriate to be the first court to make the "materiality" determination, the Court noted that the suppressed evidence "may have persuaded the jury that Cone had a far more serious drug problem than the prosecution was prepared to acknowledge, and that Cone's drug use played a mitigating, though not exculpating, role in the crimes he committed." Id. at 475.

Likewise, each of the documents withheld by the government in this case shared a common feature: each strengthened the inference that the victim was sexually involved with multiple teenagers in his community, and that potentially included appellee. As in Cone, the suppressed evidence would have been pertinent to explaining the bizarre behavior of the accused, as well as circumstances which might have motivated the killing. In both cases, the accused committed atrocious, violent crimes. See Williams, 637 F.3d at 200-01; Cone, 556 U.S. at 453. And, in both cases, the suppressed evidence could have been used at trial to persuade the jury that the defendant's judgment was "substantially affected," in contrast to

[48] N.T. 2/3/1986 at 1871-75.

the government's presentation of Mr. Cone as a "calculating, intelligent criminal who was fully in control of his decisions and actions at the time of the crimes,"[69] and in contrast to the government's presentation of appellee as a calculating, heartless killer,[70] despite having "all kinds of advantages." N.T. 2/3/1986 at 1873-75.

Though the government suppressed only a few choice statements, the impact of suppression was far-reaching.[71] As part of the consideration of "the defendant's ability to investigate alternate defense theories and to formulate trial strategy"[72] this Court found that reasonable defense counsel could and would have taken the following measures had the suppressed evidence been disclosed: during the penalty phase, reasonable defense counsel would have re-called Reverend Poindexter, questioning the Reverend about the basis of his belief that Mr. Norwood was a homosexual, that Mr. Norwood had used his position at the church to surround himself with adolescent boys – he had in fact established a Youth Theater group, and that complaints had been lodged about Norwood's sexual advances on some of those boys. That testimony would have changed at least one juror's view of Mr. Norwood. It would have been natural to second-guess whether Mr. Norwood intended to engage in a sexual act with appellee on the night of the murder. Viewed through that lens,

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[69] Cone, 556 U.S. at 454.

[70] The prosecution argued that appellee decided to pursue a life of crime, which culminated in his decision to "squash[ ] [the victim] like a bug that you might be irritated with against a windshield." N.T. 2/3/1986 at 1973.

[71] In Lapointe v. Commissioner of Correction, __ A.3d __, 138 Conn.App. 454 (Oct. 9, 2012), the Appellate Court of Connecticut held that a police detective's note – which read "30-40 mins. Poss." – reflecting information that the detective had received from fire marshals as to a possible burn time of a fire allegedly set by the defendant, was suppressed. The Lapointe Court found that this evidence, which would have been used to buttress an alibi defense, was "material." As demonstrated by Lapointe, even small handwritten notes found in the government's files will be considered "material" when supporting a theory that contradicts evidence of guilt put forth by the prosecution. While this recent case obviously has no precedential value in Pennsylvania, this Court found Lapointe to be helpful, as Ms. Foulkes' handwritten notes and the other items suppressed would have supported a theory contradicting evidence of culpability meriting death put forth by the prosecution.

[72] Ly, 980 A.2d at 76.

reasonable defense counsel would also have re-called Mamie Norwood in order to highlight the parallels between the decedent's actions on the night of the killing and the night in which Mr. Norwood brought a "young male, slim" into his home, then drove that person away in his car and did not return until the next morning. Draper testified at trial that appellee – a young, slim male – went into Mr. Norwood's home "for like 15, 20 minutes, and I was wondering what was taking him so long, so I walked back down the street, and that's when he was coming out of the house." N.T. 1/22/1986 at 668. After appellee emerged from Mr. Norwood's home with $10, Mr. Norwood picked appellee up in his car and drove off for a few minutes. Id. at 671-72. When they returned, appellee told Draper to ask for a ride home; Draper got in the car and directed Norwood, ultimately ending up at the cemetery, where he was killed. Id. at 672-75. The similarities between the night of the murder and the previous suspicious late-night activity with an adolescent boy supports the argument that appellee was another one of Norwood's teenage sexual targets. And finally, appellee would have called Ronald House to testify that when he and Mr. Norwood were alone, Mr. Norwood propositioned him for sex and touched his genitals.[73]

Viewed cumulatively, the non-disclosed evidence would have enabled appellee's attorney to argue *credibly* in his closing argument during the penalty phase that Amos Norwood was a homosexual ephebophile who had taken advantage of a number of boys, including appellee. Appellee's penalty-phase closing argument could have focused on explaining how appellee's judgment was "substantially affected" by Norwood's sexual impropriety, which "may have been enough to have one juror find a mitigating circumstance,

[73] Of course, armed with all of this evidence connecting these dots, reasonable defense counsel would also have hired an investigator to speak to the acolytes and youth theater participants with whom Amos Norwood worked at St. Luke's. See N.T. 1/14/1986 at 157-58; 166-67; 172-74. Many more victims of Mr. Norwood's ephebophilia might well have turned up.

at which point the jury would have had to weigh the mitigating circumstances against the aggravating circumstances."[74] Ly, 980 A.2d at 85, *citing* Commonwealth v. Rush, 838 A.2d 651, 661 (Pa. 2003).

Considering the totality of the circumstances, including possible effects of non-disclosure on the defense's trial preparation, an argument by a reasonable defense attorney about how evidence of Norwood's sexual misbehavior with teenage boys meant that appellee lashed out as a result of having been sexually abused may have been enough to have one juror find a mitigating circumstance under § 9711(e)(8). Had evidence crediting appellee's experience with Norwood been available, it would have "tend[ed] to . . reduce the penalty," thereby "cast[ing] the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice." Brady, 373 U.S. at 87-88. Cumulatively, this evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" of death. Cone, 556 U.S. at 470.

Appellee demonstrated that this Court had jurisdiction and, for all of the reasons stated herein, that he is entitled to relief in the form of a new penalty phase.

BY THE COURT:

M. TERESA SARMINA, J.

[74] If the jury was deadlocked, unable to unanimously vote for death, the judge would be required to impose a sentence of life imprisonment. See 42 Pa.C.S. § 9711(c)(v) ("The court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.").

At the outset of the trial of appellee's case, the Honorable David N. Savitt explicitly directed the trial prosecutor, Ms. Foulkes, to not only fulfill her ordinary obligations to disclose exculpatory evidence, but to go beyond that and to turn over to the defense evidence that could be "peripherally" construed as exculpatory:

> Any evidence that is exculpatory to the defendant in this case, the Commonwealth is directed to make available to counsel. In determining what is exculpatory, I would ask that you construe it liberally, even peripherally so and that does not mean it is admissible. It is simply something to show Mr. Panarella. It is important you have everything."

N.T. 1/6/1986 at 105.

Ms. Foulkes, however, did not comply with the Judge's directive. Instead of showing Mr. Panarella "everything," Ms. Foulkes did not share evidence favorable to appellee which was squarely within her possession. She did not inform Mr. Panarella that she knew Mr. Norwood had groped 16-year old Ronald House "on privates"[1]; that Reverend Poindexter knew that parishioners lodged "complaints" regarding Mr. Norwood's sexual impropriety[2]; that as part of Draper's plea agreement, she would write to the Pennsylvania Board of Probation & Parole (Parole Board) on his behalf, detailing his cooperation with the government[3]; and that Mamie Norwood had informed her that after seeing appellee's photograph in the newspaper she remembered he was the one on her porch the day her husband disappeared.[4] Additionally, Ms. Foulkes failed to locate and turn over exculpatory evidence located in the police files. She did not provide a June 1984 Activity Sheet, in

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[1] N.T. 9/20/2012 (P.M.) at 120-23; see Attachment D, marked as Exhibit Court-2 before this Court, page 2.

[2] See Attachment Q.

[3] See Attachment P, marked as P-15 in the PCRA hearing before this Court.

[4] N.T. 1/14/1986 at 120; see Attachment R, which was not marked as an exhibit in the PCRA hearing before this Court. Prior to the evidentiary hearing on September 20, 2012, appellee's counsel reviewed the contents of the District Attorney's trial boxes for less than six hours. Given the tight deadline imposed by the fact that appellee's execution was scheduled for October 3, 2012, a complete review of the files was not practicable for anyone in the time allotted. In the interests of concluding its review, this Court again went through the contents of the files after the completion of the evidentiary hearing. Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen this document.

which Mrs. Norwood recounted a night where she woke up and saw both her husband and a young, slim male in the house, and then watched from the window as they got into Mr. Norwood's car and drove off.[5] That same activity sheet also detailed a complaint from the mother of a 17-year old parishioner about Mr. Norwood propositioning the boy for sex. Instead of following Judge Savitt's order to get "everything" to Mr. Panarella, Ms. Foulkes did not do so, even though the discovery packet containing the statements of Mrs. Norwood and Reverend Poindexter did not include the portions of their statements directly and indirectly substantiating Mr. Norwood's homosexual ephebophilia.

There is a common thread tying together the evidence that the trial prosecutor failed to disclose: almost every piece of evidence strengthens the inference that Mr. Norwood was sexually inappropriate with teenage boys, and had some semblance of a relationship with appellee. Not only does that pattern of non-disclosure violate appellee's due process rights under Brady, as well as the mandatory disclosure provision of the Pennsylvania Rules of Criminal Procedure[6], but it also calls into question the trial prosecutor's intent as the architect of this prosecution. This Court found that, based on her decisions to disregard Judge Savitt's directive and based on her testimony at the September 2012 PCRA evidentiary hearing, Ms. Foulkes exhibited "gamesmanship," choosing not to disclose evidence that would have supported the contention that appellee had been the victim of Mr. Norwood's sexual advances.

In the Herbert Hamilton case, for which Ms. Foulkes had prosecuted appellee in early 1985 – nearly one year before prosecuting him in the Amos Norwood case – Ms. Foulkes aggressively sought a first degree murder conviction and imposition of the death penalty. She described the

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[5] See Attachment E, marked as P-24 in the PCRA hearing before this Court.

[6] Pa.R.Crim.P. 305(B)(1), now codified at 573(B)(1), controlled at the time of appellee's trial. Rule 305(B)(1)(a) required that the Commonwealth disclose material evidence in the possession of the Commonwealth's attorney. Rule 305(B)(1)(d) mandated disclosure of "circumstances and results of any identification of the defendant by voice, photograph, or in-person identification."

Hamilton prosecution to this Court as "an appropriate first-degree case." N.T. 9/20/2012 (A.M.) at 10, 80. This Court concurs that it was, in fact, an appropriate case for first degree murder. However, the jury returned a verdict of third degree murder. The trial judge, the Honorable Alfred F. Sabo, Jr., himself commented at appellee's sentencing that the verdict did not match up with the evidence presented: "This was a most horrible crime. How they came to third-degree, the intent to do bodily harm but not to kill, is beyond me." N.T. 6/3/1985 at 19. Despite the trial court's admission that the third degree verdict shocked him, Ms. Foulkes testified in the hearing before this Court that "[t]here was certainly a lot of issues [sic] here in any event and I didn't think it was an inappropriate verdict." N.T. 9/20/2012 (A.M.) at 80. Ms. Foulkes stated that she "didn't mind what the – what the verdict was." Id. And again later in the hearing, Ms. Foulkes reiterated that position:

> I didn't care what the verdict was as long as the jury considered all the evidence. I presented it to the best of my ability. If this had not been a death penalty, if the jury had not come back with the death penalty, that would not have worried me. If the juror [sic] had come back with third degree in the second case, that would not have bothered me.

N.T. 9/20/2012 (P.M.) at 95.

However, this Court did not find that testimony credible. This Court found that the third degree verdict in the Hamilton case colored Ms. Foulkes' decisions when she prosecuted appellee for the murder of Amos Norwood. First, Ms. Foulkes identified what she believed to be the reason that the jury returned a "compromised" verdict.[7] And then she attempted to eliminate evidence which caused the "compromised" verdict from being presented to the jury. In the hearing before this Court, Ms. Foulkes hypothesized that "a lot of issues" in the Hamilton case explained the jury's decision to return an inconsistent verdict. When asked what she meant by "issues," Ms. Foulkes responded, "Well, there were these sexual overtones and relationships and what have-you." N.T. 9/20/2012 (A.M.) at 80. The "sexual overtones and relationships," which she credited with leading

[7] N.T. 9/20/2012 (A.M.) at 79.

the jury to reach a compromise verdict, revolved around the fact that a middle-aged man may have been paying appellee, still in his teens, for sex.

In her opening statement in the Hamilton case, Ms. Foulkes had stated:

> However, Terrance Williams also had a secret life, and that secret life was his engagement in making money by hustling homosexuals for favors, for money, for clothing, for anything of value to him, and Herbert Hamilton was one of a number of people that Terrance Williams engaged in this.
>
> Herb Hamilton was not the only individual with whom Terrance Williams engaged in this kind of enterprise. You'll hear from Marc Draper that Terrance Williams had told him that he on other occasions sought to earn money, make money, what have you, by having homosexual acts with various individuals.

N.T. 2/14/1985 at 23.

And, during the trial of the Hamilton case, Ms. Foulkes represented to the Court, during her direct examination of Draper, that appellee was sexually involved with multiple older men.

> ADA FOULKES: Let me ask you this: do you know on how many occasions he had engaged in this kind of activity, that is, in exchange for sexual favors for money or for clothing or something of that nature –
> MR. GALLAGHER: Objection.
> ADA FOULKES: – based on what he told you?
> MR. GALLAGHER: Objection.
> THE COURT: Could I see you? Where are you trying to go? I don't understand your question.
> ADA FOULKES: That we're not talking about one person, we're talking about several different people, not just one individual. The purpose of the testimony is to indicate that Herb Hamilton is not the only person that he has ever engaged in this kind of activity with.

N.T. 2/20/1985 at 350-51.

> ADA FOULKES: All right. Now, on the other occasions that Terry discussed how he obtained money, had Terry indicated to you that with other individuals from whom he obtained money or clothing, that he engaged in sexual relations?
> MR. DRAPER: Yes.

Id. at 354.

Ms. Foulkes admitted to this Court that her knowledge of appellee's sexual past created an obvious implication that his relationship with Amos Norwood was substantially similar to his relationship with Herbert Hamilton. She testified, "Did I suspect that there was a sexual connection

between them [appellee and Amos Norwood]? Yes I did." N.T. 9/20/2012 (A.M.) at 110. But Ms. Foulkes made certain that the jury did not see that sexual connection. When confronted about the existence of evidence supporting *her own* suspicion that Mr. Norwood had been sexually inappropriate with appellee at the PCRA hearing before this Court, Ms. Foulkes grossly misrepresented the evidence in the government's files. She stated that she "had not a scintilla of evidence that Mr. Williams had actually had any sexual relationship with Mr. Norwood." N.T. 9/20/2012 (A.M.) at 135. She told this Court that all witnesses who were asked about Mr. Norwood's homosexual tendencies "all said no." N.T. 9/20/2012 (P.M.) at 99. Specifically, Ms. Foulkes stated that she "had no information from Reverend Poindexter at the time there was anything untoward about any conduct in the church." Id. at 106.

This, however, the Court found to be absolutely contrary to the evidence which Ms. Foulkes had in hand. Hard evidence uncovered during the review of the government's trial files *directly* contradicted Ms. Foulkes' assertions. A note in Ms. Foulkes' own handwriting[4] recounted a specific instance in which Ronald House had been molested by Mr. Norwood.

> THE COURT: Does that refresh your recollection at all? It's a Ms. House and her son Ronald who is 16 years old. He had been in a play and was touched on his private [sic] and then it has some notation, I think in your handwriting, "Heard from others about possible incidents."
> MS. FOULKES: "Touched on privates, I don't do that, nobody would have to know" – I didn't remember this, but yes, there must have been this one report from a Ms. House.
> . . .
> So when it goes onto [sic] the part that you've highlighted, it says, "Son in play, Ronald, touched on privates, I don't do that, nobody would have to know, brought boy home and asked him not to say anything, and then he stopped coming to church, disappeared," and it says, "Never verified it, and 29 years, first time," and then it says at the bottom, "Heard from others about possible incidents." That must have been Ms. House.

Id. at 121-22.

Additionally, a police activity sheet in the government's trial file revealed that Detective Daniel Bennett had uncovered information about Mr. Norwood being "linked to possible

[4] See Attachment D, marked as Exhibit Court-2 in the PCRA hearing before this Court.

homosexual activities."[9] A handwritten note found in the District Attorney's Office's trial file demonstrates that Ms. Foulkes knew that Detective Bennett's investigation produced specific information about Mr. Norwood's sexual involvement with parishioners at his church.[10]

Ms. Foulkes' statements to this Court about the dearth of evidence regarding Mr. Norwood's homosexuality weighed heavily on her credibility considering the evidence found in the government's trial files. This Court was unable to believe that she "had not a scintilla of evidence" about a sexual relationship between appellee and Mr. Norwood. This Court was constrained to find that Ms. Foulkes intentionally rooted out information which strengthened the inference of a homosexual connection between appellee and Amos Norwood from being presented to the jury by the defense.

This Court found that Ms. Foulkes chose not to disclose that evidence in an attempt to cure the "issues" that had led to a compromise verdict in the Hamilton case, and to keep as much as possible regarding those "issues" out of the trial of the Norwood case.[11] And after having failed to disclose this evidence, Ms. Foulkes then made a closing argument that contradicted her own belief

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[9] See Attachment U, which was marked as Exhibit P-28 in the PCRA hearing before this Court.

[10] The note in Ms. Foulkes' handwriting, which was not introduced as an exhibit at the PCRA evidentiary hearing, as it was not uncovered until this Court conducted a final review of the government's trial files following the conclusion of the evidentiary hearing, reads: "D. Bennett talks to Rev. Poindexter who advises of other complaints by parishioners re. dec'd's homosexuality." (See Attachment Q). This note suggests that Ms. Foulkes not only knew about Mr. Norwood's sexual orientation, but that she also knew of specific examples of Mr. Norwood's homosexual ephebophilia. Thus, this note is yet another piece of evidence corroborating this Court's conclusion that Ms. Foulkes was not credible when she said that all witnesses asked about Mr. Norwood's interest in teenage boys "said no." Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen this latter document.

[11] Not only did Ms. Foulkes keep these "issues" from being presented to the empanelled jury, but she also chose the jury with an eye towards weeding out jurors who might have been sympathetic to victims of sexual impropriety. Ms. Foulkes testified before this Court that a "second reason" she struck venireperson Alberta White was because Ms. White's "son had been sexually assaulted and one of the things that I look for in jurors is whether or not they would be emotionally able to separate out their personal experiences from issues that might arise during trial." N.T. 9/20/2012 (A.M.) at 131. Ms. Foulkes had also testified about striking Ms. White as part of the Batson claim raised in the 1995 PCRA petition. N.T. 4/16/1998 at 712.

about the true nature of appellee's relationship with Amos Norwood.[12] When asked by this Court whether it occurred to her, "maybe he's [appellee's] doing Norwood and getting money," Ms. Foulkes admitted, "Of course it occurred to me." Id. at 109. Nonetheless, she argued:

> Now ladies and gentlemen, you know the horrible circumstances of the death of Amos Norwood. You know that the defendant, Terrance Williams, for no other reason but that a kind man offered him a ride home, that he and another man tied him up in the darkness of a cemetery, and beat him to death, squashed him like a bug that you might be irritated with against a windshield, beat him with two blunt instruments.

N.T. 2/3/1986 at 1873.

The major difference between the Hamilton and Norwood cases is that evidence of a sexual relationship between the middle-aged victim and appellee was presented to the jury in the first, but not in the second. The Court is quite mindful that Ms. Foulkes had no duty to do the defense's job for them, and she had the right to present a different theory of the case that focused on a robbery of the victim and not on a relationship that existed or might have existed between the victim and appellee. However, she did have a duty to provide the defense with that evidence, because it was exculpatory and "material." The fact that a portion of Ms. Foulkes' penalty phase closing argument – the culmination of prosecuting appellee for both the Hamilton and Norwood murders – focused on an aspect of the evidence that could have been rebutted by the withheld information more than suggests that Ms. Foulkes was aware of the significance of what was brushed under the rug. This Court concluded that intentionally rooting that evidence out of the Norwood case in order to secure

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[12] During the penalty phase of the Norwood case, Ms. Foulkes called ADA Jeffrey Kolansky to testify about appellee's conviction for the burglary and robbery of Don and Hilda Dorfman. During her direct examination of Mr. Kolansky, Ms. Foulkes elicited details of the facts underlying that conviction. She asked Mr. Kolansky about the time of the offense, the nature of the offense, the type of weapon used, and how that weapon was used on Mr. and Mrs. Dorfman. N.T. 2/3/1986 at 1821-23. However, when Ms. Foulkes called Detective Lawrence Gerrard to testify about appellee's conviction for third degree murder in the killing of Herbert Hamilton, she shied away from asking questions about the facts of the offense. Besides basic information like the location, date and age of the victim, the only other question Ms. Foulkes asked was about the cause of death. Id. at 1826-28. The fact that Ms. Foulkes chose to present to the jury in the Norwood case some details of the Dorfman robbery, but not to do so with respect to the Hamilton killing is yet another indication that Ms. Foulkes did not want the jury in the Norwood case to learn about what she felt had been "issues" in the Hamilton case.

a death penalty sentence amounted to "gamesmanship." As in Thiel,[13] where the government failed to disclose information and then "used [it] skillfully in rebuttal," Ms. Foulkes failed to disclose her knowledge of evidence of Norwood's sexual improprieties with teenage boys, as well as her belief that Norwood was sexually involved with appellee.[14] And, then, she skillfully used the non-disclosure of that evidence in her penalty-phase closing argument, seizing the opportunity to characterize Amos Norwood as a sympathetic victim who had merely offered appellee a ride home. In Thiel, as noted in the body of this Opinion, our Superior Court labeled the prosecutor's gamesmanship "trial by ambush." Here, Ms. Foulkes' decisions constituted "penalty phase by ambush." Accordingly, this Court considered Ms. Foulkes' conduct as part of its decision to grant a new penalty phase hearing.

In addition, this Court found other behavior of Ms. Foulkes during the course of the Norwood trial to weigh into the finding that she was not credible when she said that she "didn't care what the verdict was as long as the jury considered all the evidence," which she maintained that she presented "to the best of [her] ability." N.T. 9/20/2012 (P.M.) at 95. Instead of following Judge Savitt's directive to make sure that Mr. Panarella had "everything," which would thereby have enabled the jury to consider "all the evidence," Ms. Foulkes withheld evidence that as part of Draper's deal to plead guilty to second degree murder, she promised to write a letter on his behalf to the Parole Board. Ms. Foulkes elicited testimony from Draper indicating that his *only* agreement with the Commonwealth was that in exchange for his truthful testimony against appellee, he would

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[13] 470 A.2d at 149.

[14] A review of Ms. Foulkes' notes prior to and during witness preps shows that she was an extremely thorough and meticulous prosecutor who did not want any surprises. When preparing for trial she had no way of knowing that appellee was going to testify that he had just met Mr. Norwood on the day of the killing. Everything in her possession pointed to the opposite. Appellee was admitted into Mr. Norwood's home, where he stayed for approximately 20 minutes. Shortly thereafter Mr. Norwood stopped and picked appellee up and drove off with him for a few minutes. Additionally, Ronald Rucker, who was called as a Commonwealth witness, had noted in his July 19, 1984 police interview that "Terry said Amos was a homosexual and was the type to pay people." See Attachment N.

plead guilty to second degree murder, robbery and conspiracy for the murder of Amos Norwood.

N.T. 9/20/2012 (A.M.) at 165-66.

> ADA FOULKES: Now, when an agreement was made between your attorney, yourself and the Commonwealth, was an agreement that was signed, which you have seen, made between the Commonwealth and your attorney at the time, Mr. Kenneth Dixon?
> MR. DRAPER: Yes.
> ADA FOULKES: Have you seen that agreement?
> MR. DRAPER: Yes.
> ADA FOULKES: Could I have this document marked C-18? Your Honor, if I may substitute a copy for the exhibit, so I may retain the copy that we have marked.
> THE COURT: Sure.
> ADA FOULKES: Is that agreed, counsel?
> MR. PANARELLA: Yes.
> ADA FOULKES: Mr. Draper, do you recognize the document that's marked C-18?
> MR. DRAPER: Yes.
> ADA FOULKES: Is that the agreement between you and your attorney and the Commonwealth of Pennsylvania in reference to this case?
> MR. DRAPER: Yes.
> ADA FOULKES: Is it dated August 16, 1984?
> MR. DRAPER: Yes.
> ADA FOULKES: Does it read as follows: "This letter will confirm the agreement entered into this date between the Commonwealth -
>
> [Discussion at sidebar, after which Ms. Foulkes read the August 16, 1984 letter to the jury.]
>
> ADA FOULKES: Was that the agreement that you understood and entered into with the Commonwealth in this matter?
> MR. DRAPER: Yes.

N.T. 1/22/1986 at 660-63.

On cross-examination, Mr. Panarella followed up on Ms. Foulkes' questioning regarding Draper's "deal" with the Commonwealth. Draper's bolded responses to Mr. Panarella's pointed questions were false:

> MR. PANARELLA: You have a deal [c]orrect?
> MR. DRAPER: Yes.
> MR. PANARELLA: And that deal, at some point, was put down in a writing; is that correct?
> MR. DRAPER: Yes.
> **MR. PANARELLA: Can I have C-18. Was there anything more agreed upon between you, your attorney, your family and the police or the District Attorney's office other than what is embodied within this document?**
> **MR. DRAPER: No.**
> **MR. PANARELLA: Nothing at all?**

MR. DRAPER: No.

N.T. 1/23/1986 at 778-79 (emphasis added).

This Court found that testimony was false, as the letter Ms. Foulkes personally wrote on June 23, 1988, addressed to the Pennsylvania Board of Probation and Parole (Parole Board) mentioned *another agreement* between Draper and the Commonwealth – an agreement she never disclosed to anyone else.[15] During the PCRA hearing before this Court, Ms. Foulkes read aloud the following portion of that letter:

> Therefore, it is proper for you to consider the cooperation of this inmate when determining his eligibility for parole or commutation at some future date. That I provide you with the particulars of Mr. Draper's cooperation was the only benefit or promise conveyed to him in exchange for his complete truthful cooperation. I hope this information will be useful in your evaluations.

N.T. 9/20/2012 (A.M.) at 169 (emphasis added) (See Attachment P, marked as P-15 in the PCRA hearing before this Court).

The fact that Ms. Foulkes knowingly withheld evidence of an agreement with Draper and permitted him to testify falsely that there was no additional agreement contradicts her assertion before this Court that she wanted the jury to have "all the evidence." It is a reason why this Court

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[15] In Napue v. Illinois, 360 U.S. 264, 269-70 (1959), the Supreme Court of the United States expressed disapproval for a conviction supported by a lie:

> A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth . . That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

However, this Court was without jurisdiction to consider a claim under Napue v. Illinois, 360 U.S. 259 (1959) or Giglio v. U.S., 405 U.S. 150 (1972) based on Draper's false testimony, given that the letter Ms. Foulkes addressed to the Parole Board had been in the public record since Draper filed a PCRA petition in his own case on May 10, 2000. Accordingly, appellee had failed to raise that claim with reasonable due diligence under 42 Pa.C.S. § 9545(b)(2). It is worth noting, however, that Ms. Foulkes' solicitation of false testimony on direct examination, *and* her failure to correct Draper's false testimony on cross-examination, could have been a potentially viable claim under Giglio, as non-disclosure of a promise made to a witness by the government, and subsequent testimony that there was no promise, violates a defendant's due process right to a fair trial if "the false testimony could . . in any reasonable likelihood have affected the judgment of the jury." Giglio, 405 U.S. at 154, *citing* Napue, 360 U.S. at 271.

could not avoid finding that Ms. Foulkes' testimony about being faithful to her discovery obligations was not credible, and that her conduct constituted prosecutorial "gamesmanship."

Yet another indication of Ms. Foulkes' "gamesmanship" was her decision not to provide Mr. Panarella with notice that the decedent's widow, Mrs. Mamie Norwood, was going to identify appellee as the male she had seen on her porch the day her husband went missing. Mrs. Norwood testified that she told Ms. Foulkes that she was able to identify appellee as the man she saw on June 11, 1984 at some point after the August 22, 1984 preliminary hearing. N.T. 1/14/1986 at 130. Ms. Foulkes' knowledge of Mrs. Norwood's ability to make the identification was corroborated by her handwritten notes. See Attachment R, which was not marked as an exhibit in the PCRA hearing before this Court.[16] At the time of the Norwood trial, Pa.R.Crim.P. 305(B)(1)(d)[17] stated that the following information was subject to "mandatory" disclosure: "the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification." But Ms. Foulkes went ahead and asked Mrs. Norwood to make an in-court identification of appellee without ever having notified Mr. Panarella that she would be able to do so. N.T. 1/14/1986 at 103. Before the Court recessed for lunch, Mr. Panarella objected and moved for a mistrial based on a violation of the Pennsylvania Rules of Criminal Procedure.

> MR. PANARELLA: If it hasn't, then that will allow me to proceed with my cross examination. At some point, she came forward and indicated that there was a positive identification of Mr. Williams, because I cannot believe that the Assistant District Attorney would just ask that question blindly. I believe, Your Honor, that that significant event is something that would have been, should have been made available to the defense.
> THE COURT: When did you – did you know she was going to identify the defendant? Did she say that previously?
> MS. FOULKES: Well, she told me that when she saw him in Court, and when she saw him in the newspapers, that she knew that that was the same made who had been on her porch.
> THE COURT: Don't you think that is something that the defense counsel should have been apprised of?

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[16] Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen this document, although the issue of the withholding of this information was discussed at trial and on appeal.

[17] Pa.R.Crim.P. 305 was renumbered on March 1, 2000 as Pa.R.Crim.P. 573.

MS. FOULKES: Your Honor, there are a number of things that are certainly discoverable. I don't think that it, in any way, that prejudices him to know or not to know.
THE COURT: If he is entitled to it and it's part of the discovery and it is an identification of a witness, the extent of the prejudice, of course, I am not characterizing or determining but the question first is shouldn't he have been given that information? You really had a statement of a witness who was going to identify a defendant at a crucial circumstance in court, and the order was to give the defense counsel copies of all statements.
MS. FOULKES: I gave copies of all statements.
THE COURT: You had an oral statement. You are saying that an oral statement, you don't have to give him?
MS. FOULKES: I think not, obviously.

N.T. 1/14/1986 at 103-05.

During Mr. Panarella's cross-examination of Mrs. Norwood, both Mr. Panarella and the Court clarified that, after the preliminary hearing, Mrs. Norwood told Ms. Foulkes that she was able to identify appellee as the person she saw on her porch on the night of her husband's murder.

THE COURT: Did you ever tell the Assistant District Attorney or anyone that you were able to do that?
MRS. NORWOOD: Yes.
THE COURT: You may proceed.
MR. PANARELLA: When you refer to an Assistant District Attorney, and I am correct to say that you are referring to this lady here?
MRS. NORWOOD: Yes.

N.T. 1/14/1986 at 120.

MR. PANARELLA: It is only after the preliminary hearing that you apparently come forward and discuss this with the Assistant District Attorney. Is that correct?
MRS. NORWOOD: Yes.

Id. at 129.

Whether Ms. Foulkes' decision not to inform Mr. Panarella that Mrs. Norwood would identify appellee in court constituted a violation of Pa.R.Crim.P. 305(B)(1)(d) is unimportant.[18] This

[18] Mr. Panarella moved for a mistrial on the basis of Ms. Foulkes' failure to disclose Mrs. Norwood's ability to identify appellee. Judge Savitt did not consider Mrs. Norwood's statement to Ms. Foulkes to be an "identification" falling within the purview of Pa.R.Crim.P. 305(B)(1)(d). Had he considered it such, the identification would have been subject to mandatory disclosure. Instead, Judge Savitt found that this was a "substantially verbatim oral statement" falling under Pa.R.Crim.P. 305(b)(2)(i), which was subject to discretionary disclosure. On appeal from the PCRA Court's denial of appellee's petition, the Supreme Court stated that there was no indication that the identification was deliberately withheld, nor had the identification been obtained by "suggestive means or by any other means in violation of appellant's constitutional rights." Williams II, 863 A.2d at 516.

Court found that Ms. Foulkes' decision to withhold this identification from Mr. Panarella was indicative of her state of mind while prosecuting appellee, and reflected on her credibility at the PCRA hearing before this Court in light of her steadfast claim that she "didn't care" about the jury's verdict.[19] Ms. Foulkes asserted to this Court that she wanted the jury to have "all the evidence," but this Court is disheartened to say that her actions leading up to and during the Norwood trial demonstrate that she only wanted the jury to see the evidence over which she exerted control.

The last instance of Ms. Foulkes' conduct during the Norwood prosecution that this Court wants to highlight here for the sake of completeness, is that she failed to turn over a criminal complaint and an arrest warrant for a man named Andre Peterson, for having stolen Amos Norwood's credit cards and forged his signature at a jewelry store on June 13, 1984.[20] The Commonwealth did disclose to the defense a statement from Jesse Lofton in which he was asked whether he knew a man named Andre Peterson, as well as three separate statements from Maceo Waring, a jewelry store[21] clerk who sold gold chains to a man claiming to be Amos Norwood.[22] In Mr. Waring's first statement, he identified the man who produced Mr. Norwood's non-photo identification and paid for the gold chains with Mr. Norwood's credit card as Andre Peterson.[23]

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[19] Had Ms. Foulkes advised the defense in advance that Mrs. Norwood would be able to identify appellee in court, a reasonable defense attorney would likely have requested that a lineup be conducted. Commonwealth v. Sexton, 400 A.2d 1289, 1292 (Pa. 1979) (holding that a trial court cannot arbitrarily and capriciously deny a request for a lineup). Identifying someone in a lineup is much more difficult than when he is sitting alone next to defense counsel.

[20] As seen on pages one and two of Attachment F – the table of contents of the discovery packet passed by the Commonwealth on September 15, 1984 – the documents supporting Andre Peterson's arrest for theft by deception and forgery of Amos Norwood's signature were not turned over to the defense. See Attachment S, which was not marked as an exhibit in the PCRA hearing before this Court. Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen these documents. This Court did not consider this evidence in its credibility determination of Ms. Foulkes as the Court had no indication prior to its final review of the government's files that anyone but appellee had ever been a suspect regarding the purchase of the gold chains. However, coming across these documents reaffirmed the Court in its earlier determination regarding Ms. Foulkes' credibility.

[21] The jewelry store was called Walnut Solid Gold at 1312 Walnut Street, Philadelphia, PA.

[22] See Attachment L, which was marked as Exhibit C-2, item 13 in the PCRA hearing before this Court, albeit for a different reason.

[23] See Attachment T, which was marked as Exhibit C-2, item 29(s) in the PCRA hearing before this Court.

However, at trial, Ms. Foulkes called Mr. Waring to testify that it was appellee who had purchased the chains. N.T. 1/24/1986 at 933-34. This Court did not give consideration to whether Ms. Foulkes' failure to turn over the documents, which illustrated that there was probable cause to believe that Andre Peterson was the person who used Mr. Norwood's card, amounted to a violation of Pa.R.Crim.P. 305(B). Instead, it is apparent that Ms. Foulkes' failure to turn over the criminal complaint and arrest warrant for Andre Peterson is yet another instance in which the prosecutor erred on the side of not disclosing evidence that could have been favorable to appellee. It is further substantiation for this Court's finding that Ms. Foulkes' assertion that it would not have "bothered" her if the jury in the Norwood case returned a verdict of third degree murder was not credible.[24]

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[24] This Court also examined Ms. Foulkes' prosecution of appellee in the Hamilton case, and found that she exhibited a pattern of playing "fast and loose" there as well. In the Hamilton case, after she had rested and appellee testified in his defense, Ms. Foulkes attempted to introduce prison letters written by appellee to Draper as evidence of appellee's consciousness of guilt. N.T. 2/21/1985 at 13. When she did so, appellee's trial counsel – Steven Gallagher, Esquire – objected on the grounds that he had previously requested all statements made by appellee, but had not yet received such letters. Id. at 619-20. After Mr. Gallagher reiterated his strong objection, Ms. Foulkes brought up the chronology of when she got the letters, clarifying a vague statement that she made earlier that she "got it in the last week." In what appeared to be an attempt to soften the blow of having failed to disclose the letters, Ms. Foulkes clearly stated that she only received them the same week as the hearing, in late February 1985:

> MS. FOULKES: I might also point out for the record that the specific page or document that will be referred to or would be referred to in this trial I received only this past Monday. So that the record is clear on that.
> MR. GALLAGHER: What was that? You received these documents when?
> MS. FOULKES: This past Monday.
> MR. GALLAGHER: Monday of this week?
> MS. FOULKES: That's right.
> MR. GALLAGHER: That's the first time Draper turned them over to you?
> MS. FOULKES: No. That's when his father turned them over to me. He sent them to his father and his father kept them in safekeeping and then he met with the father for the first time on Monday, the Court holiday, this past week in Mr. Dixon's hospital. Mr. Dixon was in the hospital. That was for the first time.

Id. at 642-43.

However, the documents found in the government's trial file in the proceeding before this Court revealed that Ms. Foulkes had access to these letters roughly two months before the date that she told Mr. Gallagher and Judge Savitt that she had received them. Her handwritten notes indicate that during a prep session on Thursday, December 20, 1984, Draper told her that appellee had been providing him with "written alternate false stories," and "Marc will provide them to [Detectives] Cimino/McNesby next Fri." (See Attachment I, marked as P-8 in the PCRA hearing before this Court). Even if Ms. Foulkes was technically correct that she had only "received" the letters the week of the proceeding in February, her statement was a shade of the truth. Instead of being forthcoming with the Court and stating that Draper told her about appellee's letters in December, Ms. Foulkes justified not having disclosed the documents by stating that she had only received them that week. Ms. Foulkes' credibility was assessed by this Court in light of her decision to deprive the trial court of relevant facts in order to improve her chances of securing admission of evidence favorable to her case.

As the courts of this Commonwealth stated in both Moose and Thiel, prosecutorial gamesmanship may play a role in a trial court's decision to fashion an appropriate remedy. Moose, 602 A.2d at 1273-75; Thiel, 470 A.2d at 149. This Court did not find Ms. Foulkes' assertions that she "didn't care what the verdict was as long as the jury considered all the evidence" credible. Ms. Foulkes represented to this Court at the September 2012 PCRA evidentiary hearing that she did not have a "scintilla" of evidence suggesting a homosexual connection between appellee and Mr. Norwood, and that all witnesses who were asked about Mr. Norwood's homosexual impropriety "all said no." However, those representations turned out to be false, as there were documents in Ms. Foulkes' own handwriting that turned up in the government's files directly contradicting her statements that such evidence did not exist. Thus, this Court was constrained to find that Ms. Foulkes was not credible, and that she suppressed evidence which strengthened the inference that appellee had been the victim of Mr. Norwood's sexual advances. As such, Ms. Foulkes' conduct as the trial prosecutor in the Norwood case would properly be labeled "gamesmanship."

(FN cont'd...) Just as Ms. Foulkes took questionable measures to help her case for the admissibility of the prison letters, it appears as though she employed a questionable tactic in preventing evidence favorable to appellee from being presented to the jury. Ms. Foulkes admitted to this Court that, during the Hamilton case, she sent Detectives John Cimino and James McNesby to talk to a potential defense witness, Gregory Lowe, before he was to take the stand. N.T. 9/20/2012 (P.M.) at 136-37. Mr. Lowe testified at the September 9, 1990 PCHA Hearing before Judge Sabo that Draper had told him in prison that he got Herbert Hamilton's keys from appellee, went to Hamilton's apartment and stabbed him in the neck after appellee had assaulted Hamilton. N.T. 9/10/1990 at 16. Mr. Lowe explained that he did not proffer that testimony at appellee's trial in the Hamilton case because the detectives told him that if he testified for appellee, "I can kiss my deal out, you know, kiss it down the river." Id. at 19. When questioned by this Court about her involvement regarding Mr. Lowe's decision not to testify, Ms. Foulkes denied playing a role. This Court did not accept Ms. Foulkes' testimony on that point, and considered her decision to send the detectives to speak with Mr. Lowe as an indication that she wanted to secure a first degree murder conviction in that Hamilton case and not, as she testified to this Court, that she "was not disappointed in the verdict" of third degree murder. N.T. 9/20/2012 (A.M.) at 79. Ms. Foulkes maintained a tight and careful control over all aspects of the evidence.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 183 EM 2012, 560 CAP
Petitioner	:	Emergency Commonwealth Application under Pa.R.A.P. 1702(d) & 3316 to Review Order Staying Execution
v.	:	
TERRENCE WILLIAMS,	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 3rd day of October, 2012, the Commonwealth's application for emergency relief is hereby **DENIED**. The Prothonotary is directed to set a briefing schedule.

A True Copy
As Of 10/3/2012

Attest:
John W. [illegible] Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 163 EM 2012
Petitioner	:	
	:	Respondent's Motion for Recusal of Chief Justice Castille
v.	:	
TERRANCE WILLIAMS,	:	
Respondent	:	

ORDER

AND NOW, this 1st day of October 2012, Respondent's Motion for Recusal is **DENIED**, as is the request for referral to the full Court.

Ronald D. Castille
Chief Justice Ronald D. Castille

A True Copy
As Of 10/1/2012

Attest: [signature]
Patricia A. [illegible]
Chief Clerk
Supreme Court of Pennsylvania

PHILADELPHIA COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

COMMONWEALTH	:	
	:	**CP-51-CR-0823621-1984**
v.	:	
	:	
TERRANCE WILLIAMS	:	
Sarmina, J.		

ORDER

AND NOW, this 28th day of September, 2012, it is ORDERED that the stay of execution is GRANTED and a new penalty phase is ORDERED.

ADA: R. Godfrey/R. Eisenberg/K. Mahler ATTY: B. Nolas/S. Nolan STENO: L. Amatucci CLERK: B. Dirscherl

BY THE COURT:

M. Teresa Sarmina
M. Teresa Sarmina

MEMORANDUM

CITY OF PHILADELPH

DATE 1/21/86

: MARK GOTTLIEB, Chief, Homicide Unit

OM : ANDREA G. FOULKES, Assistant District Attorney, Homicide Unit AGF

BJECT: COMMONWEALTH V. TERRANCE WILLIAMS, CP #84-08-2362-2367

In the event the jury in the above-referenced case currently on trial, returns a verdict of Murder I, I request that we actively seek the death penalty.

In the instant case, the defendant, along with a co-defendant Marc Draper who is testifying for the Commonwealth in exchange for a plea to Murder II, Robbery & Conspiracy, abducted Amos Norwood, 56 years, chemist and resident of Mt. Airy, to the Ivy Hill Cemetary on the pretext of obtaining a ride home. There they forced him into the cemetary, tied him with his clothes, robbed him of money, credit cards, keys, etc. and Williams went back to the car to obtain a tire iron and a socket wrench. Upon his return to the bound and denuded victim he and Marc Draper proceeded to beat Amos Norwood about the head numerous times until he was dead. After taking Marc Draper to work in Norwood's car, defendant returned with gasoline and burned the body, hidden between the gravestones to avoid its identification. Defendant obtained over $200 and purchased gold necklaces with Norwood's credit card. Thus, the first aggravating circumstance is that the case is a felony-murder which rises to Murder in the First Degree.

The defendant has been previously convicted of two serious felonies involving violence to another person:

1. In December, 1982, defendant and one Lucius Larke burglarized the residence of Don and Hilda Dorfman, both in their late 60's, in Mt. Airy, put a .22 caliber rifle to Mrs. Dorfman's head and demanded money as the terrified couple remained in bed. They ransacked the house, taking thousands of dollars worth of property. Defendant was convicted by Judge Michael Wallace and sentenced to 12½ to 25 years in prison.
2. In January, 1984, defendant was invited into the residence of Herbert Hamilton, age 50, in West Philadelphia. The victim was homosexual and Williams proceeded to get into bed with the victim concealing a knife. As Williams

[redacted]

(Rev. 2/59) RESPONSE TO THIS MEMORANDUM MAY BE MADE HEREON IN LONGHAND

tried to stab Hamilton a fight ensued and Williams knocked out Hamilton with a baseball bat and then stabbed him numerous times in the back and left the knife lodged in his neck. Kerosene and numerous spent matches were found around the body but no fire was actually started. Defendant took some property from the deceased's apartment after the killing. Defendant was found guilty by a jury of Murder III and PIC and Theft and sentenced by Judge Sabo to 13½ to 27 years consecutive to any other sentence.

The defendant is currently awaiting trial on the robbery of Mr. Robert Hill, a friend of Herbert Hamilton. Marc Draper is his co-defendant in that case as well.

In mitigation, defendant is 19 years old and went through one year of college at Cheney University. At Germantown High School, he was reputed to be a promising quarterback and his team won the City championship. He has been described by persons who know him as a Jeckyl-Hyde personality.

Please advise.

/ktm Rec'd. I reviewed case with Ronth M. Gottlieb 1/22/86

cc: file

Mark,
Approved to proceed on the Death Penalty.
Ronald D. Castille

ORIGINAL

Supreme Court, U.S.
FILED
JUL 24 2015
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No. 15-5040

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE L. WILLIAMS,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Pennsylvania

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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I. Was one of the state supreme court justices who joined the unanimous decision against petitioner in his fourth round of state post-conviction proceedings required, under the Due Process Clause and the Eighth Amendment, to grant petitioner's motion for recusal?

II. Does this case present an unsuitable vehicle for deciding whether to apply the harmless-error doctrine to constitutionalized recusal claims where that issue was not presented below, there was no error, and the state supreme court consequently did not address harmlessness?

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STATEMENT OF THE CASE

Petitioner Terrance Williams was convicted of capital murder in 1986 for beating a man to death with a tire iron—the second brutal murder he committed. Williams's guilt is undisputed, and the propriety of his conviction and sentence have been upheld through six separate rounds of state and federal review. He currently seeks this Court's review of the recusal decision of one of the Pennsylvania Supreme Court justices to join the unanimous decision against him in his most recent round of post-conviction proceedings. However, his recusal claim is meritless and not worthy of certiorari.

Facts

While gambling on a Philadelphia street corner late on the afternoon of June 11, 1984, Williams and his close friend Marc Draper, both eighteen years old, lost their money. Williams told Draper that he knew a man who lived nearby from whom he could extort money by threatening to tell the man's wife he was a homosexual. Leaving Draper behind, Williams went to the home of fifty-six-year-old Amos Norwood, and later returned with ten dollars. This money too was soon gambled away. A short time later, Norwood drove by in his blue Chrysler LeBaron. Williams exclaimed, "There goes my uncle," walked up to the car, and got in. The car drove off, but returned minutes later. Williams got out and advised Draper to "[p]lay it like you going home, like you want a ride home," so they could "take some money" from

Norwood. *Williams v. Beard ("Williams V")*, 637 F.3d 195, 200 (3d Cir. 2011); *Commonwealth v. Williams ("Williams I")*, 570 A.2d 75, 77-78 (Pa. 1990).

Williams introduced Draper to Norwood as a cousin who needed a ride home. The two got in the car, and Draper provided directions that ostensibly were supposed to lead to his house, but in fact took them to a dark, secluded area adjacent to Ivy Hill Cemetery. There, Williams and Draper grabbed Norwood, led him into the cemetery, and demanded that he lie facedown near a tombstone. A quick search of Norwood's person revealed twenty dollars hidden in his sock. As Norwood pleaded for his life, Williams and Draper removed his clothing and used it to restrain him; his hands were tied behind his back with his shirt, his legs were bound together with his pants, and his socks were jammed into his mouth. With the robbery accomplished and the victim incapacitated, Draper said, "Let's get out of here," but Williams refused, saying, "We're getting ready to do something." As Williams went to the car, Draper kept watch over the bound victim while taunting him for "liking boys." *Williams V*, 637 F.3d at 200-01; *Commonwealth v. Williams ("Williams VI")*, 105 A.3d 1234, 1241 (Pa. 2014); *Williams I*, 570 A.2d at 78.

Williams returned with a tire iron and a socket wrench, the latter of which he gave to Draper. Williams repeatedly hit Norwood in the head with the tire iron while urging Draper to join in the bludgeoning. Draper complied, and joined Williams in beating Norwood to death. After the murder, the conspirators deposited the victim's

body between two tombstones, and left together in his car. Williams subsequently returned to the cemetery, doused Norwood's body in gasoline, and set the remains on fire. *Williams*, 637 F.3d at 201; *Williams I*, 570 A.2d at 78.

On the evening of June 14, 1984, a passerby discovered what was left of Norwood's body in the cemetery. In the time between the murder and the discovery of the remains, Williams had driven Norwood's car around town and on a trip to Atlantic City, told two friends about the murder, allowed his friends to use Norwood's telephone calling card, and personally used Norwood's credit card to buy jewelry. Police eventually traced the stolen credit and calling cards to Williams, Draper, and their friends, prompting Williams to temporarily flee for California and commence a protracted campaign to try to persuade Draper and the others to lie about his involvement in the murder. *Williams*, 637 F.3d at 201; *Williams I*, 570 A.2d at 79-80.

Trial and sentencing

At trial, Williams testified that he not only did not kill Amos Norwood, he did not know the man and had no reason to do him any harm. *Williams VI*, 106 A.3d at 1244. However, the Commonwealth proved its case through the testimony of Williams's cooperating co-conspirator; the friends to whom Williams had admitted his role in the murder; people who had seen him driving the victim's car and using the victim's credit card after the killing; police officers who recovered the victim's

jacket from Williams's bedroom after the crime; and witnesses to Williams's various acts of flight and cover-up.

On February 3, 1986, the jury found Williams guilty of first-degree murder, robbery, and criminal conspiracy. At the penalty phase, the Commonwealth presented evidence of two aggravating circumstances: that Williams committed the instant murder while in the perpetration of another felony (robbery); and that he had a significant history of violent felony convictions. That significant criminal history included the equally brutal murder of Herbert Hamilton, a 51-year-old man to whom Williams had been prostituting himself.[1] After hearing the evidence, the jury unanimously found both aggravating circumstances and returned a sentence of death.

Procedural history: 1987-2011

During the first quarter-century after Williams's trial and sentencing, he unsuccessfully litigated: a direct appeal in state court; three petitions for state post-conviction relief and appeals from the denial of such relief; and a petition for federal habeas corpus relief and appeal from the denial of that petition. *See Williams V*, *supra* (affirming denial of federal habeas corpus relief); *Commonwealth v. Williams ("Williams IV")*, 962 A.2d 609 (Pa. 2009) (affirming dismissal of Williams's third state

[1] The details of the Hamilton murder and a separate robbery that Williams committed are vividly recounted in the opinion of the court of appeals affirming the denial of habeas relief. *Williams V*, 637 F.3d at 198-200.

post-conviction petition); *Common-wealth v. Williams ("Williams III")*, 909 A.2d 297 (Pa. 2006) (affirming dismissal of Williams's second state post-conviction petition); *Commonwealth v. Williams ("Williams II")*, 863 A.2d 505, 519-21 (Pa. 2004) (affirming dismissal of Williams's first state post-conviction petition); *Williams I*, *supra* (affirming judgments of sentence on direct appeal).

At various stages of that litigation, Williams accused his trial counsel of having provided ineffective assistance by not investigating and presenting evidence at sentencing that—contrary to his perjured trial testimony claiming not to have known Norwood—he and Norwood had been in a sexual relationship. However, the state and federal courts concluded that such evidence would not have been reasonably likely to change the outcome of the sentencing proceeding. *Williams V*, 637 F.2d at 229-37; *Williams II*, 863 A.2d at 519-21.

Procedural history: 2012-present

In March 2012, Williams filed a fourth petition for state post-conviction relief in which he alleged that the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing prior to sentencing evidence suggesting that, as Williams would have personally known, Norwood was a "homosexual ephebophiliac" who had sexual encounters with male teenagers. The state post-conviction judge granted sentencing relief on that claim, and the Commonwealth subsequently appealed to the Pennsylvania Supreme Court.

During the pendency of the Commonwealth's appeal, Williams filed a petition seeking the recusal of the Honorable Ronald D. Castille, then Chief Justice of the Pennsylvania Supreme Court, on the ground that Castille had been the district attorney of Philadelphia at the time of the trial in this case.[2] Chief Justice Castille denied the motion.

On December 15, 2014, the Pennsylvania Supreme Court issued a decision, with Justice Michael Eakin writing for a unanimous court, reversing the grant of sentencing relief. The state supreme court found that Williams's fourth state post-conviction petition did not comply with a jurisdictional state-law filing deadline, and that his *Brady* claim was meritless in any event because he did not establish the materiality of the redundant evidence of Norwood's alleged "homosexual ephebophilia." *Williams VI*, 105 A.3d at 1240-45. Specifically, as to the *Brady* claim, the court found that Williams was aware at trial "of potential witnesses and information that would establish Norwood's homosexual attraction to teenage males," but elected not to offer that evidence to the jury and instead to present a defense built

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[2] Chief Justice Castille served as the District Attorney of Philadelphia from 1986 until 1991, joined the Pennsylvania Supreme Court in 1993, and retired from the court at the end of 2014. P.J. D'Annunzio, *After 21 Years on Pennsylvania Supreme Court Bench, Ronald D. Castille Retires*, Pittsburgh Post Gazette, Jan. 6, 2015. The Commonwealth refers to him as "Chief Justice" in this brief because he held that office at the time of the challenged recusal decision.

around his perjured testimony that he and Norwood did not know one another. *Id.* At 1244-45. Williams subsequently filed a petition for reargument, which the Pennsylvania Supreme Court denied on February 18, 2015.[3]

ARGUMENT

The petition for a writ of certiorari should be denied.

This Court should deny Williams's request for review. Chief Justice Castille acted properly—and consistently with the practices of this Court's own members—when he decided that Williams did not have a due process right to his recusal. To the extent that Williams alleges the existence of a jurisdictional split on the separate question of whether the harmless-error doctrine applies to such recusal claims, he raises an issue that was not neither presented nor addressed below and is not relevant to his case.

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[3] In the meantime, on January 13, 2015, then-Governor Thomas W. Corbett, Jr., signed a warrant of execution. On February 13, 2015, Governor Thomas W. Wolf granted Williams an indefinite reprieve as part of a statewide death penalty moratorium. In announcing the moratorium, Governor Wolf repeatedly emphasized that there is "no question" of Williams's guilt, and also stated that those, like Williams, who are guilty of heinous murders "must be held to account" and "deserve no compassion." Wolf Mem., p. 1, *http://www.scribd.com/doc/255669059/Governor-Tom-Wolf-Announces-a-Moratorium-on-the-Death-Penalty-in-Pa.* The Commonwealth has filed an action in the Pennsylvania Supreme Court, docketed in that court at No. 14 E.M. 2015, seeking to overturn the death penalty moratorium because it exceeds Governor Wolf's authority under state law.

A. Petitioner's claim that he was constitutionally entitled to the recusal of a state supreme court justice who joined the unanimous opinion in the most recent post-conviction appeal in his case is meritless and unworthy of review.

Williams's principal contention is that Chief Justice Castille was constitutionally required to grant his motion for recusal. That claim has no basis in this Court's precedent, and, moreover, does not present any of the ordinary factors, such as a jurisdictional split, that might warrant certiorari review.

"The Due Process Clause demarks only the outer boundaries of judicial disqualifications," such as cases in which a judge has a very significant personal or financial relationship with one of the parties, or previously has presided in the matter under review. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009) (citation omitted); *see, e.g., Tumey v. Ohio*, 273 U.S. 510 (1927) (recusal required where judge, by virtue of fact that he also served as town mayor, received portion of fees and costs assessed to defendant in event of conviction); *Ward v. Monroeville*, 409 U.S. 57 (1972) (similar, except that fines imposed by mayor-judge went to town treasury); *In re Murchison*, 349 U.S. 133 (1955) (recusal required where judge presided at hearing in case in which he previously had served as *de facto* grand juror); *Caperton, supra* (recusal required where party to case had donated more than $3 million to judicial campaign of state justice who provided decisive vote reversing

verdict of more than $50 million against donor).[4] "Most matters relating to judicial disqualification [do] not rise to a constitutional level." *Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702 (1948); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821 (1986) ("Certainly only in the most extreme cases would disqualification on [the basis of bias or prejudice] be constitutionally required.").

Here, Williams contends that, despite the absence of a personal or financial relationship between Chief Justice Castille and any of the litigants, recusal was required because the chief justice had been the district attorney at the time of his prosecution, and therefore had been named *ex officio* on certain documents and had formally approved his assistants' decision to seek the death penalty. However, as Chief Justice Castille's decisions denying identical recusal requests over the years have cogently explained, the recusal decisions of this Court's own members demonstrate otherwise. *See, e.g.*, *Commonwealth v. Beasley*, 937 A.2d 379 (Pa. 2007) (Castille, J., denying recusal); *Commonwealth v. Rainey*, 912 A.2d 755 (Pa. 2006)

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[4] In addition to citing the Due Process Clause of the Fourteenth Amendment, Williams at times makes passing citations to the Eighth Amendment—"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted," U.S. Const. amend. VIII—as a basis for his recusal argument. However, he does not develop an argument under the Eighth Amendment, and any attempt to do so would be futile. Chief Justice Castille was not Williams's sentencer, and no punishment was inflicted when Chief Justice Castille denied recusal during the fourth round of state post-conviction litigation. *Cf. Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994) (explaining that state official's conduct must constitute "the infliction of punishment" to implicate Eighth Amendment).

(Castille, J., denying recusal); *Commonwealth v. Abu-Jamal*, 720 A.2d 121 (Pa. 1998) (Castille, J., denying recusal), *cert. denied*, 528 U.S. 810 (1999); *Commonwealth v. Jones*, 663 A.2d 142 (Pa. 1995) (Castille, J., denying recusal), *cert. denied*, 516 U.S. 835 (1995).

For instance, in *Laird v. Tatum*, 409 U.S. 824 (1972), which Chief Justice Castille has often cited when denying identical recusal requests,[5] then-Justice (later Chief Justice) William H. Rehnquist determined that the fact that he had held a high-level supervisory position in the Department of Justice while Laird was being investigated and prosecuted, and had publicly expressed views on the underlying legal issue, did not warrant even discretionary disqualification, because he did not personally participate in Laird's prosecution. Similarly, in *Schneiderman v. United States*, 320 U.S. 118 (1943), which Justice Rehnquist cited in *Laird*, Justice William F. Murphy declined to disqualify himself even though the case had been brought and tried by the Department of Justice while Justice Murphy was the attorney general. And, of course, the seminal decision in *Marbury v. Madison*, 5 U.S. 137 (1803), was authored by Chief Justice John Marshall even though he had been, in his prior capacity as the secretary of state, formally involved in the underlying controversy.

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[5] *See, e.g., Rainey*, 912 A.2d at 759; *Abu-Jamal*, 720 A.2d at 123-24; *Jones*, 663 A.2d at 144.

In the case at hand, Chief Justice Castille's situation was like that of Justice Rehnquist in *Laird* and Justice Murphy in *Schneiderman*. Although obviously not as large as the Department of Justice, the Philadelphia District Attorney's Office was a very substantial office that employed about 225 attorneys and disposed of over 50,000 criminal cases each year during Chief Justice Castille's tenure as district attorney. *Abu-Jamal*, 720 A.2d at 123; *Jones*, 663 A.2d at 143. Given this enormous volume of cases, Chief Justice Castille has observed, it was impossible for him to be personally involved in the prosecution of every case handled by his office. *Abu-Jamal*, 720 A.2d at 123; *Jones*, 663 A.2d at 143.[6]

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[6] Williams also cites various newspaper articles from 22 years ago, when Chief Justice Castillle was running for election to the Pennsylvania Supreme Court, that characterized his approach as "tough on crime" and quoted him as having said that he indirectly conveyed his position on the death penalty to voters by telling them that he "sent 45 people to death row as District Attorney of Philadelphia" (Pet. at 14-15). But, of course, those articles were not full transcripts of Chief Justice Castille's remarks; they contained only the limited portions of his comments that the reporters chose to include. *Cf. Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913, 914 (2004) (Scalia, J., denying recusal) ("The decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported."), *quoting Microsoft Corp. v. United States*, 530 U.S. 1301, 1302 (2000) (Rehnquist, C.J., denying recusal).

Moreover, there was nothing about the reported remarks that was specific to Williams's case. While he was among the 45 defendants whom juries or judges sentenced to death during Chief Justice Castille's tenure as the district attorney, Chief Justice Castille has explained that the appearance of his name on court filings in those cases was a mere "administrative formality," and that his "formal approval of [capital charging] recommendations from [his] assistants, recommendations

As was true of the justices in *Laird* and *Schneiderman*, the mere fact that Justice Castille held a high-level supervisory position in the office that brought the underlying prosecution fell well short of mandating his disqualification from on appeal. Particularly as a member of a court of last resort who could not be replaced by another jurist, it was appropriate for him to hear the appeal in this case after considering Williams's recusal motion and assuring himself that this was not a prosecution in which he had any significant involvement during his tenure as the district attorney.

Finally, in addition to being wrong on the merits, Williams's recusal claim does not present any of the ordinary factors that would counsel in favor of certiorari. Williams does not identify any jurisdictional split regarding the proper standard for determining when the Due Process Clause requires recusal based on a judge's prior involvement in the case, nor does he identify any broader impact that further review of his recusal claim would have.

Indeed, in Pennsylvania, Williams's case is almost certainly one of the *last* to present the specific issue here, since Chief Justice Castille has retired from the bench and it has been 24 years since he served as Philadelphia's district attorney. *See supra*

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approved at all levels in the chain of command, simply represented a concurrence in their judgment that the death penalty statute applied, *i.e.*, that one or more of the statutory aggravating circumstances set forth in the Sentencing Code, *see* 42 Pa.C.S. § 9711(d), existed, and nothing more." *Beasley*, 912 A.2d at 757-58.

at 6 n.2. At this late date, when all affected parties have had more than two decades to litigate the issue and the situation can no longer recur, it would not be an effective use of the Court's finite resources to now take up the issue of whether Chief Justice Castille was required to recuse himself in cases in which he was the district attorney at the time when charges were filed.

Williams is seeking fact-bound error-correction, with little potential for significant precedential benefit, in a case in which there simply was no error. Certiorari is not warranted.

B. Certiorari is not warranted on the unpreserved and purely abstract question of whether due-process-based recusal claims are subject to harmless-error review.

Unable to establish a split of authorities on the standards governing due-process-based recusal claims, Williams alleges that there is a jurisdictional split on the separate question of whether such claims are subject to harmless-error review (Pet. at 21-24). However, that claim was not neither presented nor addressed below and is not relevant to this case.

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb,* 451 U.S. 493, 496-97 (1981); *accord Adams v. Robertson,* 520 U.S. 83, 87 (1997). Further, when "the highest state court has failed

to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969); *accord Adams*, 520 U.S. at 86-87.

Here, Williams did not present the Pennsylvania Supreme Court with his theory that constitutional recusal claims are not subject to harmless-error analysis, and thus that the full court must reverse Chief Justice Castille's ruling on the recusal motion even if it believed that his participation had no effect on the outcome of the appeal. Indeed, Williams's recusal motion made no mention at all of the impact, if any, that Chief Justice Castille's participation in the case might potentially have on his colleagues. Accordingly, that issue was not "pressed or passed upon below," and is not appropriate for certiorari review. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988).

Moreover, the harmless-error question that Williams raises for the first time in his certiorari petition does not present a live controversy here for the fundamental reason that there was no error in the denial of his request for recusal and, consequently, neither Chief Justice Castille nor the broader Pennsylvania Supreme Court would have had need to address the issue of harmless error even if it had been raised.

This case does not present a suitable vehicle for deciding the unpreserved and (here) purely abstract question of whether constitutionalized recusal claims are subject to harmless-error review. The petition for a writ of certiorari should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 24, 2015

IN THE
SUPREME COURT OF THE UNITED STATES

Terrance Williams, *Petitioner*	:	No. 15-5040
v.	:	
Commonwealth of Pennsylvania, *Respondent*	:	(Capital Case)

CERTIFICATE OF SERVICE

I, RONALD EISENBERG, a member of the Bar of this Court and counsel for respondent, hereby certify that on this 24th day of July, 2015, a copy of the Brief in Opposition to the Petition for Writ of Certiorari was served by first class mail, postage prepaid, on counsel for petitioner:

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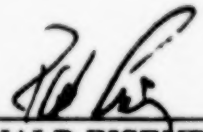
I further certify that all parties required to be served have been served.



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R. SETH WILLIAMS
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July 24, 2015

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Re: Terrance Williams v. Pennsylvania
No. 15-5040 (Capital Case)

Dear Mr. Harris:

Enclosed please find an original and ten copies of the Brief in Opposition to the Petition for Writ of Certiorari and a certificate of service in the above-captioned matter.

Thank you for your consideration.

Sincerely,

RONALD EISENBERG
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/akd
Enclosures

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No. 15-5040

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE WILLIAMS,

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COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

CAPITAL CASE

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner, Terrance Williams, files this reply brief in support of his Petition for Writ of Certiorari, and prays that the Court issue its writ of certiorari to review the denial of Petitioner's motion to recuse then-Chief Justice Ronald Castille of the Pennsylvania Supreme Court, and the subsequent judgment of that court reversing the lower court's grant of sentencing relief based upon the Commonwealth's violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny.[1]

ARGUMENT

This case squarely presents a question that, as the Commonwealth does not and cannot dispute, has divided federal circuit courts and state courts, and now begs for resolution—does the bias of one tribunal member impermissibly taint the judgment of the whole tribunal regardless of whether the biased member cast the deciding vote? Petitioner's case is an ideal vehicle for this question because Chief Justice Castille, as the Philadelphia District Attorney, made the final decision to seek death against Petitioner, and then, as the Chief Justice, reviewed a ruling that his office (while he was District Attorney) committed prosecutorial misconduct at the capital sentencing proceeding by failing to disclose favorable evidence to the defense. Although Chief Justice Castille did not cast the deciding vote in reversing the lower court's ruling, his associate justices could not reasonably be expected to rule that their Chief Justice's office had committed misconduct, and the tribunal's deliberations had, at a minimum, the appearance of impropriety.

This question—whether the participation of a biased judge in the adjudicatory process so taints the fairness, or the appearance of fairness, of appellate review as to violate due process—

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[1] All emphasis herein is supplied unless otherwise indicated. Relevant state court decisions were included in the Appendix filed with the Petition for Writ of Certiorari and are cited herein as "A-" followed by the page number. A Supplemental Appendix containing Petitioner's motion to recuse Chief Justice Castille is cited as "SA-" followed by the page number and is included with this brief.

has split the courts below. Its resolution is important not only to the litigants in this case, but to the public at large, who have a vested interest in insuring that the decisions within the justice system, and particularly the decision to affirm a sentence of death, are made by tribunals that are free from the taint of bias.

In opposing the petition, the Commonwealth argues that this issue is "unpreserved and purely abstract." Respondent's Brief in Opposition (BIO) at 13. Neither argument is accurate. The question is anything but abstract: it is integral to the recusal request.

Citing Petitioner's failure to explicitly discuss, in his recusal motion, the impact that Chief Justice Castille's participation would have on his colleagues, the Commonwealth asserts that Petitioner has not preserved this issue. BIO at 14. But this argument would make sense only if Petitioner's motion for recusal were read as seeking Chief Justice Castille's recusal only *in the event that* he cast the deciding vote, which it did not. Petitioner sought the recusal of Chief Justice Castille because he was a member of the multi-member tribunal that would be adjudicating the appeal, and Petitioner explicitly argued that the Chief Justice's participation in the case would cause bias or, at a minimum, the appearance of bias. SA-1-2, 9.

Moreover, Petitioner requested that the recusal motion be referred to and decided by the full court in the event that Chief Justice Castille declined to recuse himself. SA-14-16. Chief Justice Castille denied this request too. Contrary to the Commonwealth's argument, Petitioner's recusal motion necessarily included the question whether the bias of one tainted the opinion of all.

Furthermore, this question developed into a distinct issue only when Justice Castille participated in the adjudication of Petitioner's case *after* denying Petitioner's requests.

As this Court has explained when discussing its jurisdiction:

> If the question [is] only an enlargement of the one mentioned in the assignment of errors [presented in state court], or if it [is] so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued.

Dewey v. City of Des Moines, 173 U.S. 193, 197-98 (1899); *see also Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992) (a litigant seeking review in this Court "generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below"). If an issue is "necessarily connected" to the claim presented to the state courts—in other words if the question cannot avoid "touching the question" included in the presentation of error to the state court—this Court properly exercises jurisdiction over the question presented. *See Dewey*, 173 U.S. at 198. The issue of whether Chief Justice Castille's participation in the tribunal's adjudication of Petitioner's appeal violated due process and the Eighth Amendment is "necessarily connected" to the issue of whether Chief Justice Castille's failure to recuse himself itself violated due process and the Eighth Amendment.

The Commonwealth also argues that due process did not require Chief Justice Castille's recusal. BIO at 9. To the contrary, this is a textbook example of judicial bias. If ever there was a case that "offer[s] a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused," *Caperton v. Massey Coal Co.*, 556 U.S. 868, 878 (2009), this is it.

The Commonwealth cites the practices of this Court's own members in an attempt to justify Chief Justice Castille's decision not to recuse himself. BIO at 10. However, those practices actually support Petitioner's position. In *Laird v. Tatum*, 409 U.S. 824 (1972), then-Justice William H. Rehnquist agreed that a former Justice Department official should be

disqualified if he signed a pleading or brief or actively participated in any case. *Id.* at 828. Citing one of his prior recusals, Justice Rehnquist noted that in *S & E Contractors, Inc. v. United States*, 406 U.S. 1 (1972), a case "in which I had only an *advisory role* which terminated immediately *prior to* the commencement of the litigation, I disqualified myself."[2] *Laird*, 409 U.S. at 829. Justice Rehnquist did not recuse himself in *Laird* only because he had "never participated, either of record or in any advisory capacity . . . in the government's conduct of the case." *Id.* at 828. Likewise, in *Schneiderman v. United States*, 320 U.S. 118 (1943), Justice William F. Murphy did not recuse himself from a case where the basis for recusal was the fact that the case was brought and tried while he was Attorney General. *See Laird*, 409 U.S. at 830. Of these examples,[3] *S & E Contractors*, where recusal was found to be warranted, is the only case in which the sitting justice had any role in the case while working for the Justice Department.

Further, the Commonwealth's comparison of the Philadelphia District Attorney's Office to the Department of Justice, BIO at 11, is inapt. As noted in *Laird*, the recusal issue with respect to former Justice Department officials, particularly Attorneys General, is "special" because the Department of Justice "is the largest law office in the world and has cases by the hundreds of thousands and lawyers by the thousands. For the most part, the relationship of the Attorney General to most of those matters is purely formal." 409 U.S. at 829 (internal quotations

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[2] Justice Rehnquist was never the Attorney General. *See, e.g., Laird*, 409 U.S. at 825-27.

[3] The Commonwealth also cites Chief Justice John Marshall's authoring of *Marbury v. Madison*, 5 U.S. 137 (1803), despite his prior involvement in the case as Secretary of State. Petitioner finds no record of either party in *Marbury* requesting Chief Justice Marshall recuse himself and notes that the Chief Justice's prior involvement was not part of the "accusatory process." *See In re Murchison*, 349 U.S. 133, 137 (1955).

and citations omitted). The comparison is particularly ill-suited in this case, where the District Attorney personally authorized his office to pursue the death penalty.

The Commonwealth also compares Petitioner's case to a list of purportedly "identical recusal requests," BIO at 10, which Chief Justice Castille previously denied. However, it fails to note the obvious controlling distinctions. In denying the other recusal motions, Chief Justice Castille relied on the fact that he was *not* the District Attorney during the defendants' trials, had *no* personal involvement or participation in the matters, and had *not* prejudged the cases in any way. *See Commonwealth v. Beasley*, 937 A.2d 379, 381 (Pa. 2007) (opinion denying recusal); *Commonwealth v. Rainey*, 912 A.2d 755, 757-58 (Pa. 2006) (opinion denying recusal) ("I was not personally involved in . . . the charging decisions that were made in [t]his case . . . ."); *Commonwealth v. Abu-Jamal*, 720 A.2d 121, 122-23 (Pa. 1998) (opinion denying recusal) ("I personally neither contributed to, nor participated in, the prosecution of appellant's case[4] . . . . I was not privy to any special information that could possible hamper my ability to fairly and impartially decide this appeal. . . . I have not prejudged appellant's matter . . . ."); *Commonwealth v. Jones*, 663 A.2d 142, 143-45 (Pa. 1995) (opinion denying recusal).

The Commonwealth also cites Chief Justice Castille's claim that his "formal approval of [capital charging] recommendations" was simply a "concurrence in [his assistants'] judgment that the death penalty statute applied, *i.e.*, that one or more of the statutory aggravating circumstances . . . existed, and nothing more." BIO at 11-12 n.6 (first alteration in original) (internal quotations and citations omitted). Chief Justice Castille has stated: "My concurrence in

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[4] Chief Justice Castille noted that it was then-mayor of Philadelphia, Edward Rendell, who was the District Attorney at the time of Mr. Abu-Jamal's trial and who approved the Commonwealth's pursuit of the death penalty against Mr. Abu-Jamal. *Abu-Jamal*, 720 A.2d at 122 n.1.

the judgment of my assistants that notice should be provided to a murder defendant of potential aggravating circumstances is not . . . a level of involvement" that requires recusal. *Rainey*, 912 A.2d at 758.

Chief Justice Castille's description of the grave decision to seek the death penalty as a mere ministerial act is entirely unpersuasive. Whether there is sufficient evidence to support an aggravating factor does not, ipso facto, determine whether a death sentence is sought. The Commonwealth does not assert that it was Chief Justice Castille's policy as District Attorney to capitally charge every case in which there was evidence to support at least one aggravating factor. Rather, the decision to seek death is a most serious exercise of discretion. *See Wayte v. United States*, 470 U.S. 598, 607-08 (1985).

In any event, the record in this case does not reflect a mere concurrence in providing notice of potential aggravating circumstances. Rather, the trial prosecutor sent a memorandum to her superiors requesting that she be authorized to seek the death penalty. The prosecutor's memorandum described the facts of the crime, the aggravating circumstances, and the mitigating circumstances. A-110-11. In personally approving her request to seek death, then-District Attorney Castille participated directly and significantly in the prosecution of this case. If the decision to seek death in a particular case is not part of the "accusatory process," *see In re Murchison*, 349 U.S. at 137, it is unclear what would be.

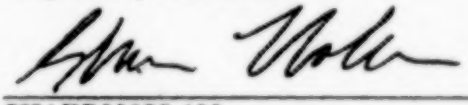
The Commonwealth dismisses Petitioner's case as unworthy of this Court's attention on the ground that it is fact-bound and non-recurring in light of Chief Justice Castille's retirement from the court and the lapse in time since his service as District Attorney. BIO at 12-13. In fact, cases where an appellate judge was previously involved in the case as a prosecutor are quite likely to recur, as are cases challenging one tribunal member's bias and its impact on the court as

a whole. This latter issue will arise any time that a recusal motion is filed with respect to one judge on a multi-member appellate tribunal.

CONCLUSION

This Court should issue its writ of certiorari to resolve the uncontested split among lower courts and to review the decisions of Chief Justice Castille and the Pennsylvania Supreme Court.

Respectfully submitted,



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Counsel for Petitioner

Dated: August 7, 2015

No. 15-5040

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE WILLIAMS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PROOF OF SERVICE

I, Shawn Nolan, certify that on this 7th day of August, 2015, I caused a copy of the foregoing *Reply in Support of Petition for Writ of Certiorari* to be served by FIRST CLASS MAIL, postage prepaid, upon all parties required to be served under SUP. CT. R. 29, listed below:

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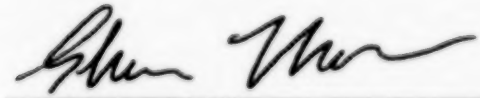

Shawn Nolan

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August 7, 2015

Scott S. Harris, Clerk
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Re: No. 15-5040, *Terrance Williams v. Pennsylvania* (Capital Case)

Dear Mr. Harris:

Enclosed please find an original and ten copies of Mr. Williams's Reply in Support of Petition for Writ of Certiorari and accompanying Supplemental Appendix. I have also included an additional copy of both and would appreciate your date stamping and returning them to me in the enclosed self-addressed, stamped envelope.

Thank you for your consideration in this matter.

Sincerely,

Shawn Nolan
Chief, Capital Habeas Unit

Enclosures
Cc: Ronald Eisenberg, Esq.

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No. 15-5040

IN THE SUPREME COURT OF THE UNITED STATES

TERRANCE WILLIAMS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania

CAPITAL CASE

SUPPLEMENTAL APPENDIX TO REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Motion to Recuse Chief Justice Castille (and accompanying exhibits), Oct. 1, 2012 ..... SA-1

IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	
Petitioner,	:	No. 163 EM 2012
v.	:	
TERRANCE WILLIAMS,	:	
Respondent.	:	

RESPONDENT'S MOTION TO RECUSE CHIEF JUSTICE CASTILLE

Respondent Terrance Williams, through counsel, respectfully moves for recusal of Chief Justice Ronald D. Castille from the instant proceedings. In support of this motion, Mr. Williams states as follows:[1]

1. Chief Justice Castille was the District Attorney for Philadelphia from January 1, 1986 until March 12, 1991.

2. Chief Justice Castille *personally authorized his Office to seek the death penalty in this case*, hand-writing the following on a memorandum to Mark Gottlieb, Chief of his Office's Homicide Unit, which was introduced as an exhibit during the recent PCRA evidentiary hearing:

> Mark,
> Approved to proceed on the Death Penalty.
> /s/ Ronald D. Castille

PCRA Evidentiary Hearing Exhibit P-1, Memorandum to Mark Gottlieb, Chief, Homicide Unit, page 2 (dated 1/21/86) (appended as exhibit A); see also NT 9/20/12 (a.m.) at 11 (trial prosecutor Andrea Foulkes identifies Chief Justice Castille's signature on this document as authorizing the approval to proceed on the death penalty).

[1] All emphasis herein is supplied unless otherwise indicated.

3. Chief Justice Castille was the District Attorney throughout the trial, capital sentencing, post-trial, and direct appeal proceedings in this case.

4. On direct appeal in Mr. Williams' case, the Philadelphia District Attorney's Office filed a Brief in the Pennsylvania Supreme Court, asking the Court to affirm Mr. Williams' convictions and death sentence. Then-District Attorney Castille is identified as one of the listed counsel for the Commonwealth on the cover and signature page of the Brief (appended as exhibit B).

5. In the current PCRA proceedings, evidence was introduced that, on June 23, 1988, trial prosecutor Foulkes wrote a letter to the Pennsylvania Board of Probation and Parole on behalf of Marc Draper, a key Commonwealth witness at Mr. Williams' trial. See PCRA Evidentiary Hearing Exhibit P-15 (appended as exhibit C). The letter asks the Board to "consider [Mr. Draper's] cooperation ... when determining his eligibility for parole or commutation," and notes that this recommendation from the prosecutor was a "benefit or promise conveyed to" Mr. Draper in exchange for his testimony against Mr. Williams. Id. at 2. The trial prosecutor testified at the recent PCRA hearing that this promise to the Commonwealth's witness was not disclosed to the defense at trial. In her PCRA ruling, Court of Common Pleas Judge Sarmina cited this undisclosed inducement, among several other items of evidence, as evidence demonstrating that the trial prosecutor suppressed exculpatory evidence, played "fast and loose" with the truth, "had no problem disregarding her ethical obligations," and "took unfair measures to win." NT 9/28/12 at 37, 39 45. Although Chief Justice Castille is not the signatory of the letter, the letter is written on the official letterhead of the Philadelphia District Attorney's Office and the sole name on the letterhead is "Ronald D. Castille, District Attorney." If for no other reason than the appearance of impropriety, Respondent respectfully suggests that recusal is appropriate for this reason as well.

6. In 1993, Chief Justice Castille campaigned for a position as a Justice on the

Pennsylvania Supreme Court. His election campaign stressed his record as Philadelphia's District Attorney and, in particular, emphasized then-District Attorney Castille's pursuit of capital punishment and that, as District Attorney, he "put 45 people on death row," one of whom is Terrance Williams, Respondent on the pending Commonwealth motion to vacate the stay of execution. Examples include:

* "Castille had campaigned as the law-and-order candidate, airing television commercials portraying [his opponent] as being soft on crime." Lisa Brennan, "Republicans Win Court Seats," LEGAL INTELLIGENCER (Nov. 4, 1993) (available on Westlaw, 11/4/1993 TLI 1);

* "Castille, a former Philadelphia district attorney, had campaigned as the self-proclaimed law-and-order candidate, airing television commercials portraying his Democratic opponent as soft on crime." Associated Press, "Castille Wins Top Court Seat," ALLENTOWN MORNING CALL (Nov. 3, 1993) (available on Westlaw, 1993 WLNR 1864290);

* "Castille ... campaigned as the tough-as-nails scourge of criminals .... Castille's career as Philadelphia's district attorney, where he built a reputation as a law-and-order crime buster, thrust him in the public eye." Katharine Seelye, "Castille Defeats Nigro for Seat on Supreme Court," PHILADELPHIA INQUIRER (Nov. 3, 1993) (available on Westlaw, 1993 WLNR 1995447);

* "Castille [ran] a law-and-order campaign, touting his 45 death-penalty convictions and saying [his opponent] was soft on crime. ... 'My campaign was basically that I've spent 20 years in law enforcement as a prosecutor, and the citizens want somebody who's tough on crime. My record's been just that,' Castille said early this morning." Tim Reeves, "Castille Leads GOP Sweep of Courts," PITTSBURGH POST-GAZETTE (Nov. 3, 1993) (available on Westlaw, 1993 WLNR 2163040);

* "[W]hen he is asked why he wants to serve on the Supreme Court, what qualifies him, why voters should support him, he starts with his experience in Vietnam, works up to his record as Philadelphia district attorney and caps his pitch by declaring that he put 45 murderers on death row. Because he served in combat and as a prosecutor, he says, he is a proven law-and-order guy, tough on crime, eats nails for breakfast." "Castille used his first television ads to attack [his opponent], saying [his opponent] was lenient on drug dealers. ... Castille's TV spots conclude: 'If you are looking for a law-and-order guy – Ron Castille. He put 45 murderers on death row and has been endorsed by the over 36,000 professional police officers in Pennsylvania.'" Katharine Seelye, "Castille Emphasizes Law-and-Order Image," PHILADELPHIA

INQUIRER (Oct. 21, 1993) (available on Westlaw, 1993 WLNR 1992136);

* "Castille ... hopes a law-and-order message, coupled with name recognition in southeastern Pennsylvania, will help him win .... 'When I start talking about court reform, people's eyes glaze over,' he said. 'When I tell them about (my) sending criminals to death row or how I fought the Mafia in Philadelphia, then they're interested.'" Frank Reeves, "Castille Preaches Law-and-Order Message to Voters, PITTSBURGH POST-GAZETTE (Oct. 18, 1993) (available on Westlaw, 1993 WLNR 2134084);

* "Castille and his prosecutors sent 45 people to death row during their tenure, accounting for more than a quarter of the state's death row population. Castille wears the statistic as a badge. And he is running for the high court as if it were exclusively the state's chief criminal court rather than a forum for a broad range of legal issues. ... Castille talks about bringing a prosecutor's perspective to the bench." Tim Reeves, "High Court Hopefuls Pressing for Change," PITTSBURGH POST-GAZETTE (Oct. 17, 1993) (available on Westlaw, 1993 WLNR 2117584);

* "Castille's [TV] ad portrays [his opponent] as soft on crime and offers Castille, a former Philadelphia district attorney, as the 'law-and-order' alternative. ... The ad ... says Castille has put 45 people on death row and has received the endorsement of more than 36,000 police officers in the state." "Nigro, Castille Begin TV Campaign," LEGAL INTELLIGENCER (Oct. 14, 1993) (available on Westlaw, 10/14/1993 TLI 3); Katharine Seelye, "Judicial Candidates Begin Courting the TV Audience," PHILADELPHIA INQUIRER (Oct. 12, 1993) (available on Westlaw, 1993 WLNR 1991534) (same);

* "Some candidates ... skated perilously close to saying how they might be expected to rule on issues that could come before them as judge. Take, for example, Supreme Court Justice-elect Ron Castille – who, while pursuing a job requiring him to hear death-penalty appeals, bragged that he sent 45 people to death row when he was a prosecutor." Lynn Marks & Ellen Kaplan, "Disorder in the Courts," PITTSBURGH POST-GAZETTE (Nov. 14, 1993) (available on Westlaw, 1993 WLNR 2150772);

* Candidates "Castille, Nigro and Surrick are aware that special interest groups capable of giving money to control votes would love to hear their positions on gun control, abortion, the death penalty or any hot issue of the day. Under the current [legal] restrictions, Castille says if candidates take positions then they'll have to recuse themselves from any decisions in those cases. 'There's really no solution to it,' Castille says. 'You ask people to vote for you, they want to know where you stand on the death penalty. *I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get the hint.*'" Lisa Brennan, "State Voters Must Choose Next Supreme Court Member," LEGAL INTELLIGENCER (Oct. 28, 1993)

(available on Westlaw, 10/28/1993 TLI 1).

7. Chief Justice Castille was elected and assumed his position on the Pennsylvania Supreme Court in January 1994.

8. Since Chief Justice Castille assumed the Bench, undersigned counsel's office has sought Chief Justice Castille's recusal from several Philadelphia capital PCRA appeals, arguing that recusal was appropriate because of Chief Justice Castille's role as Philadelphia's District Attorney during some earlier stage of the case. Chief Justice Castille denied recusal in those cases. See, e.g., Commonwealth v. Porter, 35 A.3d 4, 29 (Pa. 2012) (recusal opinion of Castille, C.J.); Commonwealth v. Beasley, 937 A.2d 379 (Pa. 2007) (recusal opinion of Castille, J.); Commonwealth v. Rainey, 912 A.2d 755 (Pa. 2006) (recusal opinion of Castille, J.); Commonwealth v. Jones, 663 A.2d 142 (Pa. 1995) (recusal opinion of Castille, J.); Commonwealth v. Williams, 732 A.2d 1167, 1174 (Pa. 1999).

9. Chief Justice Castille's most recent opinions denying recusal motions based in part on his earlier role as District Attorney suggest and/or expressly state that undersigned counsel's office is acting in bad faith by seeking Chief Justice Castille's recusal. See, e.g., Rainey, 912 A.2d at 759 (accusing counsel of "reckless disregard" and writing "scurrilously"); id. at 760 (stating that counsel's "unsupported 'factual' averments are utterly false ..."); id. at 760 n.3 ("It bears noting, given the nature of the instant allegations, that the attorney's oath of office includes a pledge to 'use no falsehood.' ... In addition, the Rules of Professional Conduct prohibit lawyers from knowingly making a false statement of material fact or law to a tribunal...."); id. at 761 ("I certainly hope that the Chief Defender did not personally review and approve as a 'policy' matter the falsehoods that are the basis for [counsel's] argument contained herein."); id. at 761 (stating that counsel's "allegations are as bereft of factual support as they are distressingly unmindful of his sworn duties as a lawyer and officer of this Court"); id. at 761 ("reckless nature of [counsel's] baseless

allegation"); Beasley, 937 A.2d at 381 (accusing counsel of "false statements," "mischaracterizations" and "ethical lapses"); id. at 382 (asserting that counsel made "scandalous misrepresentations in Rainey"); id. at 382 (asserting that counsel's actions in Rainey were "unethical representation"); id. at 383 (suggesting that counsel "betray[ed] contempt for ethical standards" and "contempt for [the] court"); id. at 383 (asserting that counsel is in "dogged pursuit of a poor reputation"); Porter, 35 A.3d at 33 (rejecting counsel's "repetitious complaint that my former position as the elected District Attorney of Philadelphia County requires my recusal" for reasons stated in "multiple prior opinions" (citing Beasley)); id. at 34 (asserting that counsel's requests for Chief Justice Castille's recusal reflect counsel's "perverse worldview"); id. at 34 (suggesting that counsel's recusal motions violate "professional ethical obligations").

ARGUMENT

10. Chief Justice Castille's recusal from this matter is appropriate under Pennsylvania law, the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Eighth Amendment to the United States Constitution.

11. Moreover, should Chief Justice Castille decline to recuse himself, the Due Process Clause and the Eighth Amendment require that the recusal issue be considered and decided by the full Court.

I. DUE PROCESS AND THE EIGHTH AMENDMENT REQUIRE CHIEF JUSTICE CASTILLE'S RECUSAL

12. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980); accord In re Murchison, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). This due process right "has been jealously guarded by [the United States Supreme] Court" because it "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." Marshall, 446 U.S. at 242 (citation

and internal quotation marks omitted). And this due process requirement takes on even greater significance in a capital case, because of the Eighth Amendment's heightened due process requirements. E.g., Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

13. A fair, "impartial and disinterested tribunal," as required by the Eighth and Fourteenth Amendments, requires not just "an absence of actual bias" – there must not be "even the probability of unfairness," and "'justice must satisfy the appearance of justice.'" In re Murchison, 349 U.S. at 136 (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)). As the United States Supreme Court most recently stated in Caperton v. Massey Coal Co., 556 U.S. 868 (2009): "Under our precedents there are *objective standards* that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" Id. at 872 (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)). The Supreme Court further explained:

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

Caperton, 556 U.S. at 883.

14. These "objective standards" require recusal when the situation "offer[s] a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused." Caperton, 556 U.S. at 878 (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927)); id. at 879 (same).

15. While the "possible temptation" standard "cannot be defined with precision," Murchison, 349 U.S. at 136; Caperton, 556 U.S. at 879, it applies here, where Chief Justice Castille

was the District Attorney responsible for prosecuting Mr. Williams at trial and on direct appeal; where Chief Justice Castille in a handwritten note *personally authorized* his Office to seek the death penalty for Mr. Williams; where Chief Justice Castille's name appears as counsel for the Commonwealth on the direct appeal brief seeking affirmance of Mr. Williams' convictions and death sentence; where the claims presented in this case include claims that the District Attorney's Office, then headed by Chief Justice Castille, violated due process under Brady and related cases by suppressing exculpatory information and presenting false and misleading information to the jury; where Chief Justice Castille's name appears as counsel for the Commonwealth on a letter that is part the evidence litigated in the Court of Common Pleas in this case; where Chief Justice Castille's campaign for judicial office highlighted his obtaining the death penalty in a number of capital cases, including Mr. Williams' case; and where Chief Justice Castille appears to have expressed hostility to undersigned counsel's office.

16. Respondent respectfully submits that, considering "all the circumstances of this case, due process requires recusal." Caperton, 556 U.S. at 872. Moreover, consideration of some of the circumstances individually highlights why due process requires Chief Justice Castille's recusal.

17. The Supreme Court's finding of a due process violation in Murchison supports Respondent's argument that due process does not allow Chief Justice Castille's participation as a judge in a case where he was the District Attorney who was responsible for Mr. Williams' prosecution throughout trial and direct appeal, and personally authorized his Office to seek the death penalty.

18. In Murchison, the judge who presided at trial had conducted "'one man grand jury' proceedings" that resulted in the defendant's indictment. 349 U.S. at 136. The Supreme Court held:

> Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let

prosecuting judges be trial judges of the charges they prefer.

Id. at 137. See also Republican Party of Minn. v. White, 536 U.S. 765, 776 (2002) (describing Murchison's holding that the "judge violated due process by sitting in the criminal trial of defendant whom he had indicted").

19. Here, should Chief Justice Castille participate, the due process violation will be even more clear than it was in Murchison. While the Murchison judge returned the indictment while acting as a *judge* and, thus, did "not likely have all the zeal of a prosecutor," id. at 137, then-District Attorney Castille *was the prosecutor who personally authorized his Office to seek the death penalty* in Terrance Williams' case. Due process will thus be violated if Chief Justice Castille now assumes the role of judge. And the due process requirement for Chief Justice Castille's recusal is even more applicable because the issues in this case, as the Court of Common Pleas has found, involve the violation of Mr. Williams' due process rights (by suppressing exculpatory information and presenting misleading information to the jury) by the District Attorney's Office that Chief Justice Castille headed at that time. If ever there was a case that "offer[s] a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused," Caperton, 556 U.S. at 878, this is it.

20. The above-described reports of Chief Justice Castille's judicial election campaign further highlight why it would violate due process for Chief Justice Castille to sit in judgment here. The Caperton decision made clear that judicial elections can create circumstances under which due process requires judicial recusal. Former United States Supreme Court Justice John Paul Stevens has stated: "A campaign promise to 'be tough on crime,' or to 'enforce the death penalty,' is evidence of bias that should disqualify a candidate from sitting in criminal cases." John Paul Stevens, Opening Assembly Address, A.B.A. Ann. Meeting, 12 ST. JOHN'S J. LEGAL COMMENT. 21, 30-31 (1996). See also Keith Swisher, Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy,

Ripe for Disqualification, 52 Ariz. L. Rev. 317, 319 (2002) (under due process analysis required by Caperton, "tough-on-crime elective judges should recuse themselves from all criminal cases"). But such a sweeping rule is not necessary here. Chief Justice Castille's campaign was not just "tough-on-crime" or pro-death penalty, it was based in part on his record as District Attorney of putting people on death row, *one of whom is Mr. Williams*. Under these circumstances, at least, due process counsels Chief Justice Castille's recusal.

21. Chief Justice Castille's antagonistic attitude toward undersigned counsel's office, as evidenced by statements in his opinions denying prior recusal motions, also supports this motion for recusal on due process grounds. See, e.g., Caperton, 556 U.S. at 881 (due process requires recusal when judge "becomes 'embroiled in a running, bitter controversy'" with litigant (quoting Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971))); Commonwealth v. Dougherty, 18 A.3d 1095, 1096 (Pa. 2011) (Baer, J., concurring) (explaining that when judge "chastised an assistant district attorney who requested her recusal ..., this Court determined that such remarks increased the appearance of impropriety, and, indeed, necessitated the reversal of the judge's refusal to recuse" (citing Commonwealth v. White, 910 A.2d 648 (Pa. 2006)); id. at 1097 ("to attack counsel personally for requesting recusal, when the law requires such motions to be put forth before the judge whose actions are in question in the first instance, is obviously inappropriate"); Offutt v. United States, 348 U.S. 11, 17 n.3 (1954) (recusal required where judge criticized counsel as giving a "disgraceful and disreputable performance on the part of a lawyer who is unworthy of being a member of the profession; and I, as a member of the legal profession, blush that we should have such a specimen in our midst"); Fairley v. Andrews, 423 F.Supp.2d 800, 821 (N.D. Ill. 2006) (recusal required where judge made comments that could have been interpreted as prejudgment of the case against defendants, "especially in the wider context of the Court's negative interactions with Defendants' counsel"); United States v. Meyerson, 677 F.Supp. 1309, 1315 (S.D.N.Y. 1988) (judge recused self

because judge "resent[ed] unsupported assertions" and "tactics" of counsel); Marshall v. Georgia Pac. Corp., 484 F.Supp. 629, 631 (E.D. Ark. 1980) (recusal where reasonable observer "could assume that the court would view [statements by counsel] with considerable displeasure").

22. For all of the above-stated reasons, the Due Process Clause and the heightened due process requirements of the Eighth Amendment make Chief Justice Castille's recusal appropriate in this case.

II. PENNSYLVANIA LAW REQUIRES CHIEF JUSTICE CASTILLE'S RECUSAL

23. Pennsylvania's Code of Judicial Conduct requires recusal when a judge's "impartiality might reasonably be questioned." Id., Canon 3(C)(1). See also Joseph v. Scranton Times, 987 A.2d 633, 634 (Pa. 2009) (per curiam) ("appearance of impropriety" requiring recusal where "there are factors or circumstances that may reasonably question the jurist's impartiality in the matter"; "There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings. A trial judge should not only avoid impropriety but must also avoid the appearance of impropriety."). For the reasons already stated, Chief Justice Castille's "impartiality might reasonably be questioned" in this case; thus, recusal is required under Pennsylvania law.

24. Moreover, Pennsylvania's Code of Judicial Conduct specifically identifies the following as an example of when a judge's "impartiality might reasonably be questioned" and, thus, when his or her recusal is required – when the judge "served as a lawyer in the matter in controversy." Id., Canon 3(C)(1)(b). In Commonwealth ex rel. Allen v. Rundle, 189 A.2d 261, 262 (Pa. 1963), the Court held that a judge who was the district attorney at the time the defendant was indicted must recuse himself from defendant's post-conviction proceedings. The same is true for Chief Justice Castille here, since he was the District Attorney throughout the trial and direct appeal proceedings, and personally authorized seeking death. See also United States v. Amerine, 411 F.2d

1130, 1134 (6th Cir. 1969) (applying similar language from 28 U.S.C. § 455 (1964); recusal of judge who was United States Attorney for the district in which defendant was tried at the time when complaints were issued against defendant "is not a matter for the exercise of [the judge's] discretion but is unconditional and absolute"); United States v. Vasilick, 160 F.2d 631, 632 (3d Cir. 1947) (same for judge who was United States Attorney when indictment was returned against defendant).

25. In Jones, Chief Justice Castille stated that he was exempted from Canon 3(C)(1)(b) by the Commentary thereto: "A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection." Jones, 663 A.2d at 146 (quoting Commentary to Canon 3(C)(1)(b)). But Chief Justice Castille's role as the Commonwealth's lawyer in this case did not arise through mere "association with other lawyers" in the District Attorney's Office. Instead, as the District Attorney himself, he was charged by law with representing the Commonwealth's interests in Mr. Williams' case. While one might argue that one *assistant* district attorney "does not necessarily have an association with other" *assistant* district attorneys in the same Office, it cannot reasonably be asserted that *the* District Attorney does not "have an association" with the lawyers under his command. The District Attorney is not merely a "lawyer in a governmental agency" – he is the *head* of that agency and the actions of that agency are his responsibility *as a matter of law*. See 16 Pa.C.S. § 1420 ("the district attorney may appoint such number of assistants, learned in the law, *to assist him* in the discharge of his duties"); Commonwealth ex rel. Specter v. Bauer, 261 A.2d 573, 575 (Pa. 1970) ("district attorneys in this Commonwealth have the power – and the duty – to represent the Commonwealth's interests in the enforcement of its criminal laws"); id. at 576 (district attorney is the "sole public official charged with the legal responsibility of conducting in court all criminal and other prosecutions, in the name of the Commonwealth" (internal quotation marks omitted)); Commonwealth v. Malloy, 450 A.2d 689, 691-92 (Pa.Super. 1982) ("the district attorney is charged with the responsibility for

the investigation and prosecution of any complaint which he approves"; "the district attorney's function is to represent the Commonwealth in criminal prosecutions. In the capacity as the Commonwealth's attorney, the district attorney has traditionally fulfilled the obligation of investigation and prosecution of crime by initially evaluating complaints to determine whether a charge should be brought against a suspect. 'A District Attorney has a general and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case.'").

III. THIS CASE IS DIFFERENT FROM PRIOR CASES IN WHICH CHIEF JUSTICE CASTILLE DENIED RECUSAL MOTIONS

26. In prior cases where Chief Justice Castille denied recusal motions grounded in part upon his former position as Philadelphia's District Attorney, Chief Justice Castille relied upon the movant's inability to provide evidence that Chief Justice Castille was "personally involved" in the movant's prosecution. See, e.g., Rainey, 912 A.2d at 757 ("To the best of my knowledge and recollection, I was not personally involved in any pre-trial investigation of appellant [or] the charging decisions that were made in his case .... [Counsel] has pointed to nothing in the record that demonstrates otherwise."); Porter, 35 A.3d at 33 (rejecting counsel's "repetitious complaint that my former position as the elected District Attorney of Philadelphia County requires my recusal, even though I had no actual involvement in appellant Porter's trial or direct appeal"); Beasley, 937 A.2d at 381 ("[T]o the best of my knowledge and recollection, I was not personally involved .... [Counsel] has pointed to nothing in the record that demonstrates otherwise.").

27. In this case, there is specific evidence of Chief Justice Castille's direct, personal involvement in this case – then-District Attorney Castille's *handwritten notation personally authorized his Office to seek death.* Thus, if personal involvement is required, it is established here.

28. In any event, the question of "personal involvement" is not dispositive under the

objective standards that govern recusal matters. Even absent proof of "personal involvement," recusal would be required here, as a matter of Fourteenth Amendment Due Process and Eighth Amendment law, and under Pennsylvania law, for all of the reasons stated herein.

IV. IF CHIEF JUSTICE CASTILLE DECLINES TO RECUSE HIMSELF, THIS MATTER SHOULD BE REFERRED TO THE FULL COURT

29. In denying prior recusal motions in capital PCRA cases, Chief Justice Castille stated that, "[u]nder the existing practice of this Court, recusal has been a matter of individual discretion or conscience and only the jurist being asked to recuse himself or herself may properly respond to such a request," Jones, 663 A.2d at 143 (citing Commonwealth v. O'Shea, 567 A.2d 1023, 1034 (Pa. 1989); In re Crawford's Estate, 160 A. 585, 587 (Pa. 1932)), and denied requests that the recusal motion be referred to the full court, Porter, 35 A.3d at 34.

30. Respondent Williams respectfully submits that this practice is inappropriate in light of the *objective* standards for recusal mandated by the Due Process Clause, e.g., Caperton, 556 U.S. at 872 ("there are *objective standards* that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable'" (quoting Withrow, 421 U.S. at 47), and Pennsylvania's Code of Judicial Conduct, e.g., Canon 3(C)(1) (recusal required when "impartiality might *reasonably* be questioned").

31. To be sure, it is appropriate for a recusal motion to *first* be considered by the Justice to whom it is directed, since only that Justice can know if there are *subjective* factors that require his or her recusal. But that subjective inquiry is "just one step in the judicial process" of considering a recusal motion – if a Justice makes the subjective determination that he or she is not biased, the recusal inquiry must proceed to the *objective* inquiry that is appropriate under Due Process, the Eighth Amendment and Pennsylvania law. Caperton, 556 U.S. at 886 ("Justice Benjamin did undertake an extensive search for actual bias. But, as we have indicated, that is just one step in the judicial process; objective standards may also require recusal whether or not actual bias exists or can

be proved."). As the United States Supreme Court recently reiterated:

> The judge's own inquiry into actual bias ... is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

Caperton, 556 U.S. at 883.

32. As to the *objective* recusal inquiry, the Justice whose recusal is sought is no better able to decide, and arguably is less able, than the rest of the Court. Indeed, due process *requires* that the full Court decide the due process-based recusal issue, just as the full Court would decide any other Constitutional issue presented by a litigant.

33. Accordingly, should Chief Justice Castille decide that he is not inclined to recuse himself, the matter should be referred to the full Court for decision under the objective standards mandated by Due Process, the Eighth Amendment and Pennsylvania law.

34. At the very least, the Court should order full briefing and argument on this issue, which courts have recognized to be one of great importance. See State v. Allen, 778 N.W.2d 863, 871-73, 880-83 (Wis. 2010) (plurality opinion) (calling for briefing and argument, in light of Caperton, on question of whether due process requires full Court review of single Justice's recusal decision); U.S. Fidelity Ins. v. Catastrophic Claims, 773 N.W.2d 243, 246-47 & n.12 (Mich. 2009) (opinion of Corrigan, J.) (same, noting that "former Michigan State Supreme Court Chief Justice Clifford Taylor [has stated] that Caperton 'has to mean that the challenged justice can't make the recusal decision alone'"); id. at 250 (calling for briefing and argument on question: "Does this Court's historical recusal practice – which permits each justice to decide motions for his or her recusal ... – comport with the Caperton Court's requirement for objective standards?"); Fieger v. Gromek, 373 Fed. Appx. 567, 572 (6th Cir. 2010) (holding that due process challenge to Michigan Supreme Court's practice of single justice consideration of recusal motions was mooted by that

Court's adoption of the following "new disqualification rule": "In the Supreme Court, if a justice's participation in a case is challenged by a written motion ..., the challenged justice shall decide the issue and publish his or her reasons about whether to participate. If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing.").

CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated, Respondent respectfully prays:

1. that Chief Justice Castille recuse himself;

2. that, should Chief Justice Castille decline to recuse himself, this motion be referred to the full Court for decision; and that the full Court direct Chief Justice Castille's recusal.

Respectfully submitted,

LEIGH M. SKIPPER
Chief Federal Defender

BY:

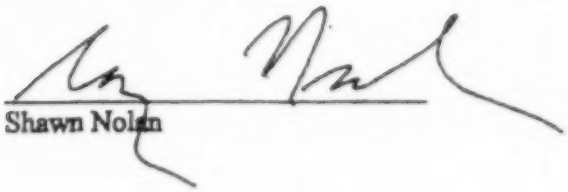
Shawn Nolan
PA Bar No. 56535
Billy H. Nolas
PA Bar No. 83177
Assistant Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
Suite 545 West – The Curtis Center
Philadelphia, PA 19106
(215) 928-0520
Counsel for Terrance Williams

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused a copy of the foregoing to be served upon the following person at the location and in the manner indicated below, which services satisfies the requirements of Pa.R.App.P. 121:

VIA HAND DELIVERY

Hugh Burns, Esq.
Office of the District Attorney
3 Penn Square South
Philadelphia, PA 19107



Shawn Nolan

Dated: October 1, 2012
Philadelphia, PA

exhibit A

MEMORANDUM

CITY OF PHILADE

DATE 1/21/86

TO : MARK GOTTLIEB, Chief, Homicide Unit

FROM : ANDREA G. FOULKES, Assistant District Attorney, Homicide Unit

SUBJECT: COMMONWEALTH V. TERRANCE WILLIAMS, CP #84-08-2362-2367

In the event the jury in the above-referenced case currently on trial, returns a verdict of Murder I, I request that we actively seek the death penalty.

In the instant case, the defendant, along with a co-defendant Marc Draper who is testifying for the Commonwealth in exchange for a plea to Murder II, Robbery & Conspiracy, abducted Amos Norwood, 56 years, chemist and resident of Mt. Airy, to the Ivy Hill Cemetary on the pretext of obtaining a ride home. There they forced him into the cemetary, tied him with his clothes, robbed him of money, credit cards, keys, etc. and Williams went back to the car to obtain a tire iron and a socket wrench. Upon his return to the bound and denuded victim he and Marc Draper proceeded to beat Amos Norwood about the head numerous times until he was dead. After taking Marc Draper to work in Norwood's car, defendant returned with gasoline and burned the body, hidden between the gravestones to avoid its identification. Defendant obtained over $200 and purchased gold necklaces with Norwood's credit card. Thus, the first aggravating circumstance is that the case is a felony-murder which rises to Murder in the First Degree.

The defendant has been previously convicted of two serious felonies involving violence to another person:

1. In December, 1982, defendant and one Lucius Larke burglarized the residence of Don and Hilda Dorfman, both in their late 60's, in Mt. Airy, put a .22 caliber rifle to Mrs. Dorfman's head and demanded money as the terrified couple remained in bed. They ransacked the house, taking thousands of dollars worth of property. Defendant was convicted by Judge Michael Wallace and sentenced to 12½ to 25 years in prison.

2. In January, 1984, defendant was invited into the residence of Herbert Hamilton, age 50, in West Philadelphia. The victim was homosexual and Williams proceeded to get into bed with the victim concealing a knife. As Williams

[redacted]

tried to stab Hamilton a fight ensued and Williams knocked out Hamilton with a baseball bat and then stabbed him numerous times in the back and left the knife lodged in his neck. Kerosene and numerous spent matches were found around the body but no fire was actually started. Defendant took some property from the deceased's apartment after the killing. Defendant was found guilty by a jury of Murder III and PIC and Theft and sentenced by Judge Sabo to 13½ to 27 years consecutive to any other sentence.

The defendant is currently awaiting trial on the robbery of Mr. Robert Hill, a friend of Herbert Hamilton. Marc Draper is his co-defendant in that case as well.

In mitigation, defendant is 19 years old and went through one year of college at Cheney University. At Germantown High School, he was reputed to be a promising quarterback and his team won the City championship. He has been described by persons who know him as a Jeckyl-Hyde personality.

Please advise.

/ktm Rec.
I recommend ceding Death
cc: file M. Gottlieb 1/22/86

Mark,
Approved to proceed on the Death Penalty.
Ronald D. Castille

exhibit B

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 98 E.D. APPEAL DOCKET 1987

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

TERRANCE WILLIAMS,
Appellant

BRIEF FOR APPELLEE

Appeal from the Judgment of Sentence of the Court of Common Pleas, Trial Division, Criminal Section, of Philadelphia County, as of Information Nos. 2362-2367, August Term, 1984.

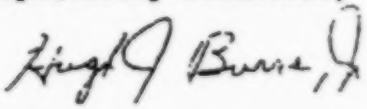
HUGH J. BURNS, JR.
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
WILLIAM G. CHADWICK, JR.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney

1421 Arch Street
Philadelphia, PA 19102

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests this Court to affirm the judgments of sentence.

Respectfully submitted,



HUGH J. BURNS, JR.
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
WILLIAM G. CHADWICK, JR.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney

exhibit C

DISTRICT ATTORNEY'S OFFICE
1421 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19102

RONALD D. CASTILLE
DISTRICT ATTORNEY

June 23, 1988

Pa. Board of Probation and Parole
P.O. Box 1661
3010 N. Front Street
Harrisburg, Pennsylvania 17120

Re: Inmate Marc Draper

To Whom It May Concern:

At the request of the family of the above-named inmate, I am submitting the following information to them with instructions to forward it to you if and when this prisoner becomes eligible for parole or commutation of sentence

Marc Draper was the co-defendant of Terrance Williams and with Williams, conspired and acted to abduct, rob and beat to death 56 year old Amos Norwood, inside the Ivy Hill cemetery in the Mt. Airy section of Philadelphia. After tying the victim with his own clothes and beating him with car tools, the co-defendants took his money, credit cards and car, obtained more money and jewelry with the stolen goods in Atlantic City and Philadelphia. Their spree was ended when credit card calls were traced by police to a third man who assisted the killers in obtaining these credit card benefits.

Mr. Draper was arrested in his home and Williams fled the jurisdiction upon issuance of warrants. On the day of his arrest, Mr. Draper completely and thoroughly confessed his participation in this hideous crime without any promises or benefits offered to him. In addition, he voluntarily gave additional information about his co-defendant's responsibility for the murder of 33 year old Herbert Hamilton in West Philadelphia six months earlier, which led to the arrest of Williams on that previously unsolved case. Draper offered to cooperate fully with the investigations and to testify truthfully in the prosecution of Williams in both homicide cases, resulting in Williams' conviction in the earlier killing of murder in the third degree (William's defense was that the killing was provoked by homosexual advances of the victim) and a verdict of murder in the first degree with the penalty of

Re: Inmate Marc Draper

death by the jury in the Norwood case. In addition, Draper agreed to plead guilty to murder in the second degree, knowing that it brought a mandatory life sentence, without any promise of leniency or early release.

Although the heinous nature of the underlying crime cannot be minimized in any way, Mr. Draper has attempted to compensate significantly for his role in this matter. While it is true that he has benefitted by avoiding the death penalty for himself, I was well aware that during the pendency of prosecutions against Williams, Mr. Draper was visited regularly in Holmesburg prison by Williams himself, at the gates of Draper's protective custody area, and by friends of Williams inside Draper's cell block. Thus, Mr. Draper's security in prison was never certain, yet he continued without complaint in his cooperation with authorities to see that justice was served in all matters in which he had information or connection.

I never had any reason to doubt Mr. Draper's veracity and he never declined to answer the most difficult questions about his own culpability. Williams sent Mr. Draper letters in prison with alternative stories to feed the authorities and the court about their criminal activities. Mr. Draper passed that correspondence on to his father, a Philadelphia police officer, with instructions to give them to the prosecutor in preparation for trial. Those letters, in addition to his oral testimony, established a compelling case against Williams, who had a frightening history for violent crimes.

Therefore, it is proper for you to consider the cooperation of this inmate when determining his eligibility for parole or commutation at some future date. That I provide you with the particulars of Mr. Draper's cooperation was the only benefit or promise conveyed to him in exchange for his complete truthful cooperation. I hope this information will be useful in your evaluations.

Yours very truly,

Andrea G. Foulkes

ANDREA G. FOULKES
Assistant District Attorney
Homicide Unit

/mp
bcc: Mr. George Draper

No. 15-5040

IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 12, 2015
CERTIORARI GRANTED OCTOBER 1, 2015

262108

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APPENDIX A — RELEVANT DOCKET ENTRIES

RELEVANT DOCKET ENTRIES FROM THE SUPREME COURT OF PENNSYLVANIA CRIMINAL CASE #: 163 EM 2012

DOCKET ENTRY

Filed Date	Docket Entry/ Representing	Participant Type	Filed by
10/01/2012	**Supplement to Petition**	Petitioner	Commonwealth of Pennsylvania
10/01/2012	**Response in Opposition to Motion to Vacate Stay of Execution**	Respondent	Williams, Terrance
10/01/2012	**Motion to Recuse Chief Justice Castille**	Respondent	Williams, Terrance
10/01/2012	**Answer to Recusal Motion**	Petitioner	Commonwealth of Pennsylvania
	* * *		
09/28/2012	**Emergency Application Under Pa. R.A.P. 1702(d) and 3316 to Review Order Staying Execution**	Petitioner	Commonwealth of Pennsylvania
	* * * *		

Appendix A

RELEVANT DOCKET ENTRIES FROM THE SUPREME COURT OF PENNSYLVANIA CAPITAL CASE #: 668 CAP

SUPREME COURT INFORMATION

Appeal From: the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at No. CP-51-CR-0823621-1984, granting a Stay of Execution

Appeal Filed Below:

Docketed Date: October 4, 2012

* * *

REARGUMENT/RECONSIDERATION/REMITTAL

Filed Date: December 29, 2014

Disposition: Order Denying Application for Reargument

Date: February 18, 2015

Reargument Order: AND NOW, this 18th day of February, 2015, appellee's Application for Reargument is DENIED.

Record Remittal:

* * *

Appendix A

DISPOSITION INFORMATION

Related Journal No: J-82A-2013

Judgment Date: December 15, 2014

Category: Decided

Disposition Author: Governor

Disposition: Vacated

Disposition Date: December 15, 2014

Dispositional Filing: **Majority Opinion**

Author: Eakin, J. Michael

Filed Date: December 15, 2014

Justice: Castille, Ronald D.
Vote: Join Majority Opinion

Justice: Baer, Max
Vote: Join Majority Opinion

Justice: Todd, Debra
Vote: Concurs in the Result

Dispositional Filing: **Concurring Opinion**

Author:

Filed Date: December 15, 2014

Appendix A

DOCKET ENTRY

Filed Date	Docket Entry/ Representing	Participant Type	Filed by
9/28/2012	**Emergency Application Under Pa. R.A.P. 1702(d) and 3316 to Review Order Staying Execution**	Appellant	Commonwealth of Pennsylvania
Comments: Transferred from 163 EM 2012			
10/01/2012	**Response in Opposition to Motion to Vacate Stay of Execution**	Appellee	Williams, Terrance
Comments: Transferred from 163 EM 2012			
10/03/2012	**Case Transferred pursuant to Order entered on 10/03/2012 at No. 163 EM 2012**		Per Curiam
10/04/2012	**Case was transferred from 163 EM 2012**		Office of the Prothonotary

* * *

Appendix A

12/15/2014	**Order Vacated, petition dismissed; judgment of sentence reinstated**		Governor

Comments:
Order vacated; petition dismissed; judgment of sentence reinstated.
Jurisdiction relinquished.
Mr. Chief Justice Castille and Messrs. Justice Baer and Stevens join the opinion.
Mr. Chief Justice Castille files a concurring opinion.
Mr. Justice Saylor and Madame Justice Todd concur in the result

12/15/2014	**Judgment Entered**		Office of the Prothonotary
12/29/2014	**Application for Reargument**	Appellee	Williams, Terrance
1/07/2015	**No Answer Letter to Application for Reargument** Commonwealth of Pennsylvania	Appellant	Carr, Peter
1/13/2015	**Warrant of Execution Filed**		Governor
2/13/2015	**Temporary Reprieve of Execution**		Governor

Appendix A

2/18/2015	**Order Denying Application for Reargument**	Per Curiam

Comments:
AND NOW, this 18th day of February, 2015, appellee's Application for Reargument is DENIED.

* * * *

APPENDIX B — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, DENYING REARGUMENT, DATED FEBRUARY 18, 2015

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 668 CAP

Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at No. CP-51-CR-0823621-1984, granting a Stay of Execution

SUBMITTED: September 18, 2013

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

TERRANCE WILLIAMS,

Appellee.

No. 669 CAP

Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at No. CP-51-CR-0823621-1984

SUBMITTED: September 18, 2013

Appendix B

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

TERRANCE L. WILLIAMS,

Appellee.

ORDER

PER CURIAM

AND NOW, this 18th day of February, 2015, appellee's Application for Reargument is **DENIED**.

APPENDIX C — APPELLEE'S APPLICATION FOR REARGUMENT IN THE SUPREME COURT OF PENNSYLVANIA, DATED DECEMBER 29, 2014

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NOS. 668 & 669 CAPITAL APPEAL DOCKET

COMMONWEALTH OF PENNSYLVANIA,

Appellant/Cross-Appellee,

v.

TERRANCE WILLIAMS,

Appellee/Cross-Appellant.

Dated: December 29, 2014

APPELLEE'S APPLICATION FOR REARGUMENT

[TABLES INTENTIONALLY OMITTED]

ORDER IN QUESTION

Appellant, Terrance Williams, respectfully submits that reargument is appropriate with regard to the decision of this Court rendered on December 15, 2014, reversing the PCRA court's grant of post-conviction relief in this capital case. *Commonwealth v. Williams*, __ A.3d __ (Pa. 2014) (slip opinion attached as Exhibit A).

Appendix C

ARGUMENT

The Court in this case reversed a ruling by the PCRA court below that the prosecution violated Mr. Williams's due process rights pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, the PCRA court ruled that the prosecution improperly withheld three pieces of evidence that each supported the proposition that the decedent, Amos Norwood, had been sexually abusing Mr. Williams from the time Mr. Williams was a young teenager, and had also abused other young boys. Exhibit A at 5-6 (describing how prosecution withheld information from Mr. Norwood's wife, Mr. Norwood's pastor, and the trial prosecutor's own notes that revealed Mr. Norwood's predatory nature). The PCRA court further ruled that Mr. Williams's claim, raised in a successor PCRA petition, was timely filed insofar as it met the governmental interference exception to the PCRA's timeliness requirement. *Id.* at 4; *see also* 42 Pa. C.S. § 9545(b)(1)(i).

This Court reversed, ruling that Mr. Williams's PCRA petition did not meet the governmental interference exception to the timeliness requirement and that Mr. Williams's *Brady* claim lacked merit. Exhibit A at 11-17. In making these rulings, the Court placed heavy reliance on the fact that "appellee knew of Norwood's homosexuality and conduct with teenage boys well before trial, sufficient to present him as unsympathetic before the jury." *Id.* at 11; *see also id.* at 12 ("Appellee's prior knowledge was also evident at his federal habeas corpus proceeding, during which he alleged Norwood was a closeted homosexual from whom he could extort cash by threatening to expose

Norwood's secret to his wife"); *id.* at 13 ("The evidence alleged to comprise the *Brady* violation does not include information unknown to appellee"); *id.* at 14 ("The pastor's suggestion that he suspected Norwood may have been a homosexual would hardly have surprised appellee, who knew that for years").

This Court's ruling that a criminal defendant's knowledge of a particular fact defeats a *Brady* claim where the prosecution withholds evidence supporting that same fact is contrary to United States Supreme Court law. A *Brady* violation is established where favorable evidence was suppressed by the government, either intentionally or inadvertently, and the suppressed evidence was material. *Simmons v. Beard*, 590 F.3d 223, 233-34 (3d Cir. 2009). The test for materiality is whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 234.

A prosecutor is not absolved from withholding exculpatory information from a criminal defendant merely because the defendant has some knowledge of the information withheld. One need look no further than *Brady* itself to establish that this Court should revisit its ruling in this case. In *Brady*, the Court granted sentencing relief in a capital case where the prosecution withheld evidence that Brady's codefendant was the triggerman. *Brady*, 373 U.S. at 84, 86. This fact was necessarily known to Brady himself, but at no point did the Court rule that the claim failed as a result of Brady's personal knowledge.

Likewise, in *Cone v. Bell*, 556 U.S. 449 (2009), the United States Supreme Court granted relief in a capital case where the prosecution withheld evidence that "strengthen[ed] the inference that Cone was impaired by his use of drugs around the time his crimes were committed." *Id.* at 470. Cone was sentenced to death for a crime spree in which he robbed a jewelry store and a drug store; shot a police officer and a bystander; attempted to hijack a car and shoot the driver; attempted to shoot a police helicopter; attempted to forcibly enter an elderly woman's house at gunpoint; and broke into the home of an elderly couple, "beat the couple to death with a blunt instrument and ransacked ... their home." *Id.* at 452. At his trial, Cone presented testimony from two expert witnesses about the effects of his drug use at the time of the offense. The government "discredit[ed] Cone's claims of drug use" by showing "that both defense experts' opinions were based solely on Cone's representations" to the experts. *Id.* at 454-55. The Court ruled that the suppressed evidence suggested that "drug use played a mitigating, though not exculpating, role in the crimes [Cone] committed" and that it "may have persuaded the jury that Cone ha[d] a far more serious drug problem than the prosecution was prepared to acknowledge." *Id.* at 475.

Much as Brady knew that he was not the triggerman, Cone knew that he was high on drugs at the time of his crime spree. Nowhere in either opinion did the Court suggest that a defendant's personal knowledge of a particular fact gives the prosecution free reign to withhold all exculpatory evidence corroborating that fact. Were that the law, a prosecutor would never be under any duty

to disclose information supporting a self-defense, mere presence, or a claim of alibi. In every case, a defendant would necessarily know that he acted in self-defense, was merely present, or was not present at all. The due process violations in *Brady* and *Cone* lay in the non-disclosure of information from witnesses other than the defendants themselves.

In short, Mr. Williams's knowledge that he was sexually abused by Mr. Norwood did not relieve the Commonwealth of its duty under the Due Process Clause to disclose evidence corroborating this abusiveness. Nor did it give the prosecutor the right to deliberately mislead the jury about information in its possession. This Court's ruling that Mr. Williams should have earlier uncovered what the Commonwealth suppressed sanctions a procedure by which the "prosecutor may hide, [and] defendant must seek"; such a procedure "is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

For the same reason that Mr. Williams has set forth a meritorious *Brady* claim, he satisfies the governmental interference exception to the PCRA's timeliness requirement. *See* Exhibit A at 8 (stating that "a *Brady* violation might fall within the 'governmental interference' exception" where a PCRA petitioner establishes "(1) the failure to previously raise the claim was the result of interference by government officials and (2) the information on which he relies could not have been obtained earlier with the exercise of due diligence"). Because the timeliness and substantive *Brady* rulings

made by the Court each rest upon the incorrect premise that Mr. Williams's personal knowledge can serve to defeat a claim that the prosecution improperly withheld exculpatory evidence, the Court should grant reargument and affirm the ruling of the PCRA court.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellant Terrance Williams respectfully requests that the Court grant this application for reargument, vacate Mr. Williams's death sentence, and remand this matter to the Philadelphia Court of Common Pleas for a new sentencing hearing.

Respectfully submitted,

/s/_____

SHAWN NOLAN
Pa. Bar No. 56535
BILLY H. NOLAS
Pa. Bar No. 83177
Federal Community Defender Office for the Eastern District of Pennsylvania
Philadelphia, PA 19106
215-928-0520

(Counsel for Terrance Williams)

APPENDIX D — OPINION OF THE SUPREME COURT OF PENNSYLVANIA, REVERSING THE GRANT OF PENALTY-PHASE RELIEF, DATED DECEMBER 15, 2014

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 668 CAP

Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at No. CP-51-CR-0823621-1984, granting a Stay of Execution

SUBMITTED: September 18, 2013

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

TERRANCE WILLIAMS,

Appellee.

No. 669 CAP

Appeal from the Order entered on 09/28/2012 in the Court of Common Pleas, Criminal Division of Philadelphia County at No. CP-51-CR-0823621-1984

SUBMITTED: September 18, 2013

Appendix D

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

TERRANCE L. WILLIAMS,

Appellee.

OPINION

DECIDED: December 15, 2014

MR. JUSTICE EAKIN

The Commonwealth appeals from the order granting a stay of execution, vacating appellee's death sentence, and awarding a new penalty hearing under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546. We vacate the stay of execution and the grant of a new penalty phase, and reinstate the sentence of death.

Appellee was sentenced to death after being convicted of the robbery and murder of Amos Norwood February 3, 1986, his second murder conviction. A detailed account of the crime is set forth in our opinion on direct appeal. *See Commonwealth v. Williams*, 524 Pa. 218, 570 A.2d 75, 77-79 (Pa. 1990). Suffice it to say, appellee and his co-conspirator, Marc Draper, took Norwood to a graveyard, tied him with his own clothes, and beat him to death with a tire iron — appellee returned the next day and set fire

to the corpse. At trial, appellee testified that Draper and another individual committed the crime; he claimed he was elsewhere at the time and uninvolved. He testified he did not know the victim, had never seen him before, and had no reason to be angry with him or wish to harm him. This Court affirmed the judgment of sentence February 8, 1990, *id.*, at 84, and appellee did not seek certiorari. He filed a timely PCRA petition March 24, 1995.

At the 1998 PCRA hearing, now represented by the Federal Community Defenders Office (FCDO), appellee abandoned his trial testimony and argued Norwood engaged in homosexual acts with him, and as set forth below, presented evidence supporting this claim. The PCRA court denied relief, and this Court affirmed. *Commonwealth v. Williams*, 581 Pa. 57, 863 A.2d 505, 523 (Pa. 2004). Appellee filed a second PCRA petition February 18, 2005, which was dismissed as untimely. This Court affirmed. *Commonwealth v. Williams*, 589 Pa. 355, 909 A.2d 297 (Pa. 2006) (*per curiam*). Appellee filed a third PCRA petition June 1, 2005, which was dismissed as untimely, and we affirmed. *Commonwealth v. Williams*, 599 Pa. 495, 962 A.2d 609 (Pa. 2009) (*per curiam*).

While that PCRA appeal was pending before this Court, appellee filed a federal *habeas corpus* petition December 19, 2005, which was denied. The Third Circuit affirmed. *Williams v. Beard*, 637 F.3d 195, 238 (3d Cir. 2011). In his federal appeal, appellee contended trial counsel was ineffective for failing to present evidence he was psychologically damaged by years of sexual abuse, which infused him with rage toward men who made sexual

advances toward him; appellee argued Norwood was one of these men and had been sexually abusing him since the age of 13. Appellee petitioned the United States Supreme Court for certiorari, which was denied. *Williams v. Wetzel*, 133 S. Ct. 65, 183 L. Ed. 2d 711 (2012) (*per curiam*).

On January 9, 2012, the FCDO visited Draper, who was serving a life sentence at SCI-Frackville. That same day, Draper signed an affidavit declaring he told detectives and the prosecution prior to trial that Norwood was a homosexual and was in a relationship with appellee. The affidavit also claimed the prosecution "wanted the motive to be a robbery and kept coming back to that. That's how they wanted me to testify, that it was a robbery." Draper's Affidavit, 1/9/12, at 4. The FCDO revisited Draper March 1, 2012, obtaining another affidavit with similar declarations.

Appellee then filed this facially untimely PCRA petition March 9, 2012, his fourth state petition for collateral review. On July 27, 2012, he filed a "Supplemental Petition for Post Conviction Relief and Notice of Filing Additional Evidence in Support of Stay of Execution," although no execution warrant had been signed. An execution warrant was subsequently issued August 8, 2012, setting the execution for October 3, 2012. Appellee filed a "Renewed Motion for Stay of Execution" August 28, 2012, and the Commonwealth filed a response September 7, 2012. On September 6, 2012, appellee filed a motion for discovery, requesting the production of exculpatory information from the Commonwealth "as well as any reports or notes made concerning Norwood's sexual relationship or sexual

abuse of [appellee] or any other child under the age of 18." Appellee's Motion for Discovery, 9/6/12, at 5-6.

On September 10, 2012, the PCRA court heard argument on the pleadings to determine whether the petition warranted an evidentiary hearing. The court gave appellee time to obtain and submit additional information from Draper, which led to his third affidavit, dated September 11, 2012. On September 14, the court heard additional argument and ordered an evidentiary hearing, which began September 20; only Draper and the trial prosecutor testified. On Saturday, September 22, the court ordered the Commonwealth to produce trial files and Philadelphia Police Department files and allowed both parties to review those files.[1] On September 24, documents from these files were offered and admitted into evidence, and the PCRA court entered 11 exhibits *sua sponte*. *See* Exhibit List, 9/20/12. The court then directed appellee to amend his PCRA petition; on September 28, appellee filed an "Amendment and Supplement to Petition for Post-Conviction Relief," requesting relief because the Commonwealth had given "sanitized" witness statements to the defense. The same afternoon, the court ruled there

1. The court's order included files for both the Norwood murder and the murder of Herbert Hamilton. Both murders had the same trial prosecutor, the same defendant (appellee), and the same key witness (Draper). In the Hamilton murder, appellee was receiving money from Hamilton in exchange for sex; appellee murdered Hamilton when he threatened to expose this relationship. Although the charge was first degree murder, the jury convicted appellee of third degree murder, about one year before the Norwood trial.

was a *Brady*[2] violation because that which was missing from original discovery suggested Norwood may have been a "homosexual ephebophiliac." PCRA Court Opinion, 11/27/12, at 12-13 (citations omitted).[3]

The PCRA court also concluded appellee's fourth PCRA petition met the "governmental interference" exception to the PCRA's timeliness requirement, 42 Pa.C.S. § 9545(b)(1)(i),[4] though it did not meet the "newly-discovered evidence" exception, *id.*, § 9545(b)(1)(ii).[5] The court ordered a stay of execution pursuant to § 9545(c)(2),[6] finding appellee exceeded the "strong

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2. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

3. The PCRA court defined "homosexual ephebophilia" as a psychological term for the attraction to "young men," both adults and adolescents. *See id.*, at 13 n.32.

4. Subsection (b)(1)(i) provides an untimely PCRA petition falls within an exception if the petitioner proves: "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States[.]" *Id.*

5. Subsection (b)(1)(ii) provides an exception for an untimely PCRA petition if the petitioner proves: "the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence[.]" *Id.*

6. Subsection (c)(2) states no stay may be issued unless a PCRA petition meeting all requirements of this subchapter of the PCRA has been filed and is pending, and the petitioner makes "a strong showing of likelihood of success on the merits." *Id.*, § 9545(c)(2).

likelihood" threshold and demonstrated actual success on the merits of his claim regarding the penalty phase. The court held the Commonwealth violated *Brady* and found appellee identified a specific claim, Norwood's homosexual ephebophilia, which he was unable to discover or develop due to interference by the Commonwealth. The interference consisted of withholding or "sanitizing" three specific pieces of evidence: a statement by Norwood's wife, a statement by the pastor of appellee's church, and notes made by the prosecutor.

The first statement involved a story Norwood's wife told police, which was omitted from the 1984 police activity sheet. She said Norwood once woke her at 2 a.m. and asked her for money while a young male stood in the hall outside their bedroom. She saw Norwood load stereo equipment into his car and drive away with the young male. She told police she believed this to be a kidnapping; when Norwood returned home around 9 a.m., he said he was abducted but escaped by using psychology on his captors. When his wife tried to call the police, Norwood asked her to avoid their involvement.

The second statement was from appellee's pastor, who was also a friend of Norwood. The pastor told police Norwood worked with and counseled young males in the church for many years. Omitted from the 1984 activity sheet was the pastor's suspicion that Norwood may have been a homosexual, and that five years earlier, the pastor received a complaint from a mother alleging Norwood propositioned her 17-year-old son for sex. The pastor also repeated for police the "kidnapping" story told by

Norwood's wife — this was included with the pastor's statements in the 1984 police activity sheet, which had been disclosed to the defense.

The court also found the Commonwealth failed to disclose handwritten notes by the trial prosecutor, purportedly recounting an instance of Norwood's behavior toward a teenage male, which would establish the prosecution's awareness of Norwood's homosexual proclivities. The court stated, had such evidence been disclosed to the defense, trial counsel would have been able to challenge the Commonwealth's sympathetic portrayal of Norwood. The court concluded the inability to portray an unsympathetic victim was enough to undermine one's confidence the jury would have returned the same verdict of death.[7]

Finding appellee exercised due diligence, the court concluded he did not know this evidence existed until his co-conspirator executed an affidavit in January, 2012, declaring a possible motive for the crime, *i.e.*, rage over

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7. The court also stated the Commonwealth interfered with appellee's *Brady* claim by "disput[ing] the existence of information in [its] files about [] Norwood's homosexual ephebophilia" when the Commonwealth represented to the 1998 PCRA court that the only evidence involved in the case was appellee's knowledge that Norwood was a homosexual and his plan to extort money from Norwood but mentioned nothing about the additional "homosexual ephebophilia" evidence. PCRA Court Opinion, 11/27/12, at 15-17. The court added a supplemental opinion to its PCRA opinion, describing additional instances that led it to conclude the prosecution exhibited "gamesmanship." *See id.* app., at 1-15.

being sexually abused by Norwood. Appellee timely filed his PCRA petition within 60 days of learning the substance of Draper's affidavit. Furthermore, the court noted appellee could not have known the Commonwealth interfered with his ability to present evidence of Norwood's homosexual ephebophilia until the underlying evidence was uncovered during the hearing held as a result of Draper's affidavit; therefore, appellee timely filed the amendment and supplement to his PCRA petition in order to particularize his *Brady* claim just three days after government files were opened. Accordingly, the court concluded appellee met his burden under 42 Pa.C.S. § 9545(b)(1)(i), and subsection (b)(2), so it had jurisdiction to grant relief. Finding appellee established his *Brady* claim, the court held he was entitled to a new penalty hearing. The court denied relief regarding the guilt phase. The Commonwealth filed this appeal, raising two issues for our review regarding the timeliness of appellee's fourth PCRA petition and the merits of his *Brady* claim.[8]

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8. The Commonwealth's issues, set forth *verbatim*, are:

> I. Was [appellee]'s fourth PCRA petition, in which he alleged a violation of *Brady*[] based on the non-disclosure of information he had known since before trial, untimely?
>
> II. In any event, was [appellee]'s *Brady* claim meritless where the information in question would not have been reasonably likely to change the outcome, had no apparent exculpatory value, and had been known all along by [him]?

Commonwealth's Brief, at 3.

Appendix D

Our standard of review of the PCRA court's grant of relief is clear: we examine whether the court's findings are supported by the record and whether its conclusions of law are free from legal error. *Commonwealth v. Colavita*, 606 Pa. 1, 993 A.2d 874, 886 (Pa. 2010). All PCRA petitions, "including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final" unless an exception to timeliness applies. 42 Pa.C.S. § 9545(b)(1). "The PCRA's time restrictions are jurisdictional in nature. Thus, [i]f a PCRA petition is untimely, neither this Court nor the [PCRA] court has jurisdiction over the petition. Without jurisdiction, we simply do not have the legal authority to address the substantive claims." *Commonwealth v. Chester*, 586 Pa. 468, 895 A.2d 520, 522 (Pa. 2006) (first alteration in original) (internal citations and quotation marks omitted). As timeliness is distinct from the merits of the underlying claims, we must first determine whether appellee's PCRA petition was timely filed in order to decide whether this Court has legal authority to address its substantive claims. *See Commonwealth v. Stokes*, 598 Pa. 574, 959 A.2d 306, 310 (Pa. 2008) (consideration of *Brady* claim separate from consideration of its timeliness).

This, appellee's fourth PCRA petition, was untimely on its face, as it was filed over 20 years after his judgment of sentence became final. The PCRA petitioner has the burden of proving an untimely petition falls within an exception outlined in § 9545(b)(1). *See Commonwealth v. Hawkins*, 598 Pa. 85, 953 A.2d 1248, 1253 (Pa. 2008) ("[I]t is the [petitioner]'s burden to allege and prove that one of the timeliness exceptions applies." (citation

omitted)). Furthermore, any PCRA petition filed under a timeliness exception must be filed within 60 days of when the petition could have first been presented. 42 Pa.C.S. § 9545(b)(2). "'[T]he 60-day rule requires a petitioner to plead and prove that the information on which he relies could not have been obtained earlier, despite the exercise of due diligence.'" *Commonwealth v. Albrecht*, 606 Pa. 64, 994 A.2d 1091, 1094 (Pa. 2010) (quoting *Stokes*, at 310).

Although a *Brady* violation might fall within the "governmental interference" exception, § 9545(b)(1)(i) nonetheless requires a petitioner to plead and prove: (1) the failure to previously raise the claim was the result of interference by government officials and (2) the information on which he relies could not have been obtained earlier with the exercise of due diligence. *Commonwealth v. Abu-Jamal*, 596 Pa. 219, 941 A.2d 1263, 1268 (Pa. 2008) (citation omitted). The merits of a *Brady* claim need not be addressed until it is established that the instant petition was timely filed. *Stokes*, at 310. Thus, the proper questions for our review are whether the Commonwealth interfered with appellee's ability to present a claim that Norwood was a homosexual with a sexual attraction to teenage males, and whether appellee was duly diligent in obtaining such information.

The PCRA court held it had jurisdiction under the "governmental interference" exception to the PCRA's time-bar, concluding the alleged *Brady* violations posited by appellee met the requirements of 42 Pa.C.S. § 9545(b)(1)(i). The Commonwealth contends appellee's PCRA petition failed to establish this exception, as appellee would have

known well before trial of any sexual relationship or abuse between Norwood and himself. In fact, the Commonwealth argues, if anyone knew about Norwood's homosexual proclivities toward teenage males, it was appellee himself. The Commonwealth points to the evidence of appellee's statements during the murder, taunting Norwood for "liking boys," and appellee's plan to extort Norwood by threatening to expose his homosexual activity.

Further, the Commonwealth contends appellee not only could have presented evidence of ephebophilia much sooner, but points out appellee did present just such a claim during his first PCRA proceedings in 1998, where he offered testimony from several witnesses alleging Norwood sexually abused him. The Commonwealth also posits that appellee's instant PCRA petition admitted he knew about Norwood's homosexual tendencies years before the murder. Since appellee already knew about this alleged material evidence, the Commonwealth contends any "sanitization" of evidence by the prosecution does not amount to a *Brady* violation. Accordingly, the Commonwealth asserts, appellee did not prove the timeliness exception applies, and the PCRA court was without jurisdiction to rule on appellee's petition, much less grant a stay of execution and a new penalty phase.

The Commonwealth also suggests the PCRA court attempted to circumvent a valid death sentence and undermine the integrity of this Court's ruling in appellee's first PCRA appeal. The Commonwealth refers to the ordering of what amounted to additional discovery to supplement appellee's inadequate petition, the court's

lengthy examination of the trial prosecutor after PCRA counsel finished his examination, and the admission of "court exhibits" *sua sponte*, later basing its "governmental interference" decision on one of its own exhibits. In sum, the Commonwealth contends the PCRA court "went to great lengths to expand the record, to reshape [appellee]'s claim, and to limit the Commonwealth." Commonwealth's Reply to Defendant's Response to Emergency Application to Lift Illegal Stay of Execution, 10/2/12, at 12. The Commonwealth, therefore, requests we vacate the stay of execution and the grant of a new penalty phase.

Appellee argues the PCRA court's timeliness findings were supported by the record and devoid of legal error. While appellee admits he had prior knowledge of Norwood's sexual orientation, he contends such prior knowledge is critically different from evidence of homosexual ephebophilia and sexual abuse of other teenage males. He distinguishes the failure to present the defense of rage at trial, his 1998 ineffectiveness claim, from the inability to present Norwood as unsympathetic, and repeats that knowledge of homosexuality is not the same as knowledge of homosexual ephebophilia, insofar as it relates to the ability to paint an unsympathetic picture of Norwood.

Appellee argues he met § 9545(b)(1)(i)'s exception because the Commonwealth interfered with his ability to proffer this particular *Brady* claim, and that he exercised due diligence by presenting the claim within 60 days of obtaining the facts on which the claim was based. Further, appellee asserts a PCRA petitioner's previous

knowledge of a fact applies only to § 9545(b)(1)(ii)'s newly-discovered evidence exception, not § 9545(b)(1)(i), alleging the Commonwealth is required to disclose evidence in its possession even if the defense has previous knowledge or other information about that fact, and the failure to disclose such evidence violates *Brady*, constituting governmental interference with the ability to present a *Brady* claim.

Our examination of the three omissions alleged leads to the inescapable conclusion that appellee is not entitled to relief. The missing reports were found to be relevant to Norwood's character, but the failure to explore or exploit that character was not a result of governmental interference — there is abundant evidence appellee knew of Norwood's homosexuality and conduct with teenage boys well before trial, sufficient to present him as unsympathetic before the jury. Appellee himself was a teenage male admittedly engaged in homosexual acts with Norwood. Although he denied any involvement in the crime at trial, evidence included his plan to extort Norwood by threating to expose him for being a homosexual, and statements in which Draper and appellee taunted Norwood for "liking boys" while they were beating him. N.T. Trial, 1/22/86, at 667-68; N.T. Trial, 1/23/86, at 813-14; *see also* N.T. PCRA Hearing, 9/20/12, at 219; N.T. PCRA Hearing Vol. 2, 9/24/12, at 13. Draper testified at trial that appellee told him Norwood was a homosexual. N.T. Trial, 1/23/86, at 814. We agree with the courts that have previously considered appellee's claims based on sexual orientation — there is no reasonable conclusion that the result of a trial for this horrific crime would have

been different had the missing information been provided as appellee would have liked.

Further, evidence offered at appellee's first PCRA hearing in 1998 demonstrated the extent of available knowledge of Norwood's sexual appetites. At that proceeding, counsel offered three expert witnesses, all of whom testified appellee and Norwood were in a homosexual relationship in which appellee was abused by Norwood; they suggested the murder was an "enraged killing" in response to the sexual abuse. *See* N.T. PCRA Hearing, 4/8/98, at 106, 115, 156-59, 186; N.T. PCRA Hearing, 4/9/98, at 360-61, 375-76; N.T. PCRA Hearing, 4/13/98, at 540, 542-44, 551-54, 569-70. Additionally, appellee's high school teacher, who was also a private psychotherapist, testified Norwood molested young boys, including appellee, and he learned this information from several people in early 1997. N.T. PCRA Hearing, 4/8/98, at 226-33. Appellee's friend, Donald Fisher, who was also in a homosexual relationship with appellee for approximately five years, testified appellee and Norwood began a homosexual relationship when appellee was approximately 15 years old, which lasted a few years, and Norwood was abusive, liked to inflict pain, and enjoyed having sex with teenage males. N.T. PCRA Hearing, 4/13/98, at 597, 602-05, 617. Fisher also testified appellee would engage in homosexual acts with Norwood for money, alcohol, and other gifts. *Id.*, at 617-18. Fisher learned this information not only from observing the relationship between appellee and Norwood but also because appellee told Fisher. *Id.* Additionally, the defense stated throughout the hearings that its mitigation witnesses were offered to show Norwood molested young

males and to demonstrate trial counsel's ineffectiveness in investigating the homosexual relationship between appellee and Norwood and the abuse involved in that relationship. *See* N.T. PCRA Hearing, 4/8/98, at 235-37; N.T. PCRA Hearing, 4/13/98, at 603.

Appellee's prior knowledge was also evident at his federal *habeas corpus* proceeding, during which he alleged Norwood was a closeted homosexual from whom he could extort cash by threatening to expose Norwood's secret to his wife. *Williams*, 637 F.3d at 200. Analyzing the record from appellee's first PCRA proceeding, the Third Circuit noted appellee and Norwood began their homosexual relationship when appellee was approximately 13 years old. *Id.*, at 229. The court stated Norwood was physically abusive toward appellee, once allegedly beating him with a belt. *Id.*, at 229-30. The federal district court also elicited testimony from appellee's first PCRA proceeding showing Norwood was a homosexual with whom appellee had sex in exchange for money, drugs, and gifts. *See Williams v. Beard*, 2007 U.S. Dist. LEXIS 41310, at *106 n.32 (E.D. Pa. May 8, 2007).

The PCRA court itself acknowledged appellee's arguments from the 1998 PCRA hearing supported his prior knowledge, stating appellee "elicited evidence from [] Fisher that [] Norwood was very degrading and he liked to have sex with kids. However, the current claim does not rest solely upon that evidence." *See* N.T. PCRA Hearing, 9/28/12, at 21. The court also noted the defense, at the time of trial, indeed had information suggesting Norwood was a homosexual — a statement from a witness

disclosing appellee told him Norwood "'was a homosexual and was the type to pay people.'" *Id.*, at 27-28. Appellee's PCRA counsel also referenced his prior knowledge at the hearings. *See* N.T. PCRA Hearing, 9/10/12, at 24 ("[W]e tried to present in prior proceedings evidence about the sexual abuse by [] Norwood of [appellee.]").

And quite tellingly, Draper's affidavits established he knew appellee and Norwood were in a homosexual relationship — "[appellee] had also told me that Norwood was gay" and during the murder, "[appellee] was yelling 'so you like boys, so you like boys' as he hit Norwood" — and appellee told Draper the murder was about the homosexual relationship. Draper's Affidavit, 9/11/12, at 2-4. Draper confirmed appellee's prior knowledge of Norwood's homosexual proclivities repeatedly in his PCRA testimony. *See* N.T. PCRA Hearing, 9/20/12, at 219; N.T. PCRA Hearing Vol. 1, 9/24/12, at 88, 93, 96; N.T. PCRA Hearing Vol. 2, 9/24/12, at 12-13.

The evidence alleged to comprise the *Brady* violation does not include information unknown to appellee, or information he would have been unable to find on his own. The "kidnapping" story told by Norwood's wife indicates that a probably untruthful story was told to her, but nothing more. The PCRA court apparently read between the lines and presumed the story was a lie to hide Norwood's homosexuality from his wife. And although this story was omitted from the wife's statements in the 1984 police activity sheet, it was dis closed with the pastor's statements in the same sheet. That is, appellee was already aware of this story, whatever its value, through other means. *See* Reverend's Disclosed Statement, Exhibit

C-2, PCRA Hearing, 9/20/12, at 5. Since appellee had it, the government did not interfere with his ability to obtain it.

The pastor's suggestion that he suspected Norwood may have been a homosexual would hardly have surprised appellee, who knew that for years. The government did not keep appellee from ferreting out the reverend, even if his opinion might have been admissible. The pastor's report that he once received a complaint alleging Norwood propositioned a teenage male would have been equally unsurprising. These allegations confirmed what appellee already knew — Norwood was a homosexual with attraction toward teenage males, like himself.[9] There simply is no surprise in this revelation, no new information or insinuation that only now suggests Norwood might be made to look "unsympathetic."

The third "interference" involves nondisclosure of handwritten notes of the trial prosecutor; the PCRA court concluded they recounted a specific instance of homosexual ephebophilia. *In toto*, the notes read, "[N]ot true — Mrs. House — son in play — Ronald — 16 yrs.[sic] — touched on privates — I don't do that — nobody wd [sic] have to know — brought boy home [and] asked him not to say anything @ [sic] the — he stopped coming to church — disappeared — never verified it — 29 yrs. [sic] — 1st X [sic] — never heard from others @ [sic] possible incidents." *See*

9. The reverend refused to make these statements in writing but related them to police in confidence. He stated, "[H]e himself handled the matter internally and the complaint never went any further than that." *See* Police Activity Sheet, Exhibit P-24, PCRA Hearing, 9/20/12.

Exhibit Court-2, PCRA Hearing, 9/20/12, at 2. The court *sua sponte* admitted these cryptic notes into evidence and used them to question the trial prosecutor.[10]

These murky notes, if decipherable with any degree of confidence, do not indicate the origin or veracity of their content; they do not indicate whether the notes were written during a witness interview, much less who was being interviewed. Indeed, they start with the notation "not true." They do not mention Norwood, whose connection to the notes we are asked to insinuate. One could infer they involve the incident omitted from the pastor's statements in the 1984 police activity sheet, where a mother told of Norwood's propositioning her teenage son. However, next to appellee's own evidence at the 1998 hearing, it adds little or nothing whatsoever to the information available and already presented. The ability to pursue the mitigating tactic of making Norwood appear unsympathetic was not created by these notes.

Lastly, we note a measure of bootstrapping in appellee's argument. It is difficult to conclude appellee learned something new from Draper's latest affidavit, as Draper's information was derived from appellee's own statements to Draper prior to and at the time of the murder. Further, Draper's suggestion that appellee was enraged at the time of the murder depends on Norwood's prior abuse of appellee, which necessarily establishes

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10. Although the Commonwealth contends the PCRA court violated Pa.R.Crim.P. 902(E)(1) in the "Statement of the Case" section of its brief, *see* Commonwealth's Brief, at 19, the Commonwealth does not raise a discovery issue on appeal; thus, we will not address discovery matters. *See* Pa.R.A.P. 302(a).

appellee's knowledge of Norwood's proclivities before trial. Thus, any failure to previously raise this claim was not the result of governmental interference. *See Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726, 730 (Pa. 2002) ("[N]o *Brady* violation occurs where parties had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence." (citation omitted)); *see also Commonwealth v. Morris*, 573 Pa. 157, 822 A.2d 684, 696-97 (Pa. 2003).

Like appellee's failed effort to establish a timeliness exception, his *Brady* claim provides no grounds for PCRA relief because the claim is inapposite to the necessary materiality inquiry. The United States Supreme Court has never held *Brady* materiality is measured in terms of "effects on the defense strategy." *See Commonwealth v. Weiss*, 622 Pa. 663, 81 A.3d 767, 810-11 (Pa. 2013) (Castille, C.J., concurring, joined by Eakin, J.). Further, *Brady* does not permit a defendant to shield himself from his prior perjury at trial. *See id.*, at 811-13.

Appellee's *Brady* theory suggested that had he received additional information about Norwood's homosexual proclivities, his defense would have learned his actual motive for the murder, *i.e.*, rage over being sexually abused by Norwood, which, in turn, would possibly lead to a new strategy where appellee does not perjure himself and Norwood is portrayed unsympathetically. Yet, at the time of trial, appellee was aware of potential witnesses and information that would establish Norwood's homosexual attraction to teenage males. Appellee could have used his prior knowledge and his counsel's due diligence to

obtain additional information and witnesses to support a different trial theory than that presented. He could have argued Norwood's homosexual proclivities developed into sexual abuse, leading to rage and ultimate murder of Norwood. He could also have created a portrait of Norwood consistent with that now proffered. However, appellee chose not to do so.

Instead, appellee perjured himself at trial, testifying he did not know the victim, had never seen him before, took no part in the murder, and had no reason to be angry with him or wish to harm him. The defense he chose to present disclaimed knowledge of Norwood, which is antithetical to what he knew and could have presented — evidence that showed Norwood as a molester, which may have led to establishing a motive of rage, or evidence allowing him to depict Norwood as an unsavory character and sexual predator. Given the choice of defense, such strategies were not relevant.[11] Given the details of appellee's crime, showing the jury the victim was "unsympathetic" was not a plan that was likely to cause reciprocal sympathy for the man who bludgeoned him and incinerated his body. Regardless, this alleged "sanitized information" claim, coupled with the possible effect on appellee's defense strategy, lacks any basis under *Brady*, as it is neither exculpatory nor material. *See Weiss*, at 810-13

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11. Trial counsel indicated at a hearing on appellee's post-sentence motions that he was left with using appellee's youth as a potential mitigating factor — since appellee provided him little, if any, assistance, he was frustrated in efforts to present a compelling group of character witnesses on his behalf. *See* N.T. Post-Sentence Motions, 4/24/87, at 21-27.

(Castille, C.J., concurring, joined by Eakin, J.). In sum, the Commonwealth did not obstruct appellee's ability to present Norwood as unsympathetic. Appellee had prior knowledge of the information on which he based his *Brady* claim, and could have presented the claim much sooner — prior to trial or at any time over the last 20 years. Because appellee's theory was built on perjury, and the information on which he relied was not exculpatory, the PCRA court erred in finding his claim material under *Brady*. Accordingly, the record does not support the PCRA court's finding appellee established his burden of proof regarding the "governmental interference" exception. *See Abu-Jamal,* at 1268 (citation omitted). Because the PCRA court was thus without jurisdiction to consider the merits of this petition, *see Hawkins*, at 1252 (citations omitted), we vacate the court's order, dismiss this petition as time-barred, and reinstate the judgment of sentence of death. The Prothonotary is directed to transmit the complete record in this case to the Governor pursuant to 42 Pa.C.S. § 9711(i).

Order vacated; petition dismissed; judgment of sentence reinstated.

Jurisdiction relinquished.

Mr. Chief Justice Castille and Messrs. Justice Baer and Stevens join the opinion.

Mr. Chief Justice Castille files a concurring opinion.

Mr. Justice Saylor and Madame Justice Todd concur in the result.

Appendix D

Judgment entered:
Dated: December 15, 2014

/s/_____
John W. Person, Jr., Esquire
Deputy Prothonotary

APPENDIX E — CONCURRING OPINION OF CHIEF JUSTICE CASTILLE, DATED DECEMBER 15, 2014

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 668 CAP

Appeal from the Order of the Court of Common Pleas, Criminal Division of Philadelphia County, Criminal Division, entered on September 28, 2012, at No. CP-51-CR-0823621, granting a Stay of Execution

SUBMITTED: September 18, 2013

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

TERRANCE WILLIAMS,

Appellee.

No. 669 CAP

Appeal from the Order of the Court of Common Pleas of Philadelphia County, Criminal Division, entered on September 28, 2012, at No. CP-51-CR-0823621, granting a Stay of Execution

SUBMITTED: September 18, 2013

Appendix E

COMMONWEALTH OF PENNSYLVANIA,

Appellant,

v.

TERRANCE WILLIAMS,

Appellee.

CONCURRING OPINION

DECIDED: December 15, 2014

MR. CHIEF JUSTICE CASTILLE

I join the Majority Opinion. Indeed, in my view, both the *Brady*[1] claim appellee initially raised, and the *Brady* claim later uncovered by the PCRA[2] court and upon which the court granted relief, are time-barred and frivolous. I write separately to expand upon the Majority discussion, and to address the important responsibilities of the PCRA trial courts in serial capital PCRA matters, an issue brought into stark relief by the extraordinary, and unauthorized, measures undertaken by the PCRA court in this case.

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1. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

2. Post Conviction Relief Act, 42 Pa.C.S. §§ 9541-9546.

Preliminarily, with respect to the latter concern, I note that this is a case involving a **fourth** PCRA petition filed by federal lawyers only after appellee was denied federal *habeas corpus* relief. The fourth petition was time-barred on its face — offering a new, recanting witness (a friend and cohort of appellee) for the same "facts" and theory appellee had long-known and already litigated — and was blatantly frivolous, filed by the FCDO[3] in a transparent effort to induce further delay. Rather than decide the claim actually presented in the efficient manner this sort of last-ditch capital litigation requires, the court below unfortunately strayed from its institutional duties. In the process, the PCRA court: ignored the strictures of PCRA jurisdiction and the appropriate parameters for discovery procedures and evidentiary hearings in serial petition matters; misapprehended what *Brady* discovery encompasses; misapprehended the substantive law concerning *Brady* materiality; and, most troubling, lost sight of its role as a neutral judicial officer. As a result, a warrant of execution was enjoined by a trial judge for no valid reason, on the basis of a frivolous fourth PCRA petition, leaving insufficient time for this Court to timely review the judge's injunction of the Governor's warrant.[4]

The PCRA court per the Honorable Teresa Sarmina, justified its actions based on what it viewed as gamesmanship by the Commonwealth in allegedly

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3. Federal Community Defender's Office.

4. Appellee cross-appealed the order below, presumably to the extent the PCRA court denied his other claims, but later discontinued that appeal by praecipe. *See* 673 CAP.

withholding relevant information from appellee. If trial level prosecutorial "gamesmanship" is revealed and is relevant, it obviously warrants notation and condemnation. But, to be relevant in a case involving a fourth PCRA petition raising a *Brady* claim, the petition would have to be proven timely (to vest jurisdiction), and the uncovered *Brady* claim would need to possess merit, which both the claim raised in this petition, and the different claim found by the PCRA court, do not. Furthermore, in the *Brady* arena, before condemning officers of the court, the tribunal should be aware of the substantive status of *Brady* law both at the relevant time and today.[5] And, just as a preview: *Brady* does not authorize searching through

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5. To the extent the alleged non-disclosures here involved matters found when the PCRA court searched police files, it should be stressed that the investigation and prosecution (murder in 1984; conviction in 1986) preceded, by many years, the U.S. Supreme Court's decision in *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), which first held that the prosecution's *Brady* obligation extends to exculpatory materials known to others acting on the relevant government's behalf, including the police. Prior to *Kyles*, in Pennsylvania, the law was that prosecutors were not responsible for the content in police files. *See Commonwealth v. Burke*, 566 Pa. 402, 781 A.2d 1136 (Pa. 2001) (abrogating prior cases). The consequent distortions in this case are not unusual in this unique area of law where cases continue to be litigated decades after trial, and federal lawyers contend that new rules or innovative rules govern collateral attacks on old cases. Any finding of misconduct respecting this nearly thirty-year old case, then — and I do not dispute the concern, even if there was zero exculpatory material to support a viable *Brady* claim — must be tempered by awareness of the governing law at the relevant times, as well as the fact that the *Brady* focus is not on any evidence, but only on exculpatory evidence and materiality.

the government's files — not at trial, not on collateral attack, and especially not on a fourth PCRA petition. This case presents a supervisory issue concerning the manner in which trial courts handle serial petitions in capital cases that I believe requires highlighting and disapproval.

As noted, I will write also to expand upon why the claim raised by appellee, as well as the different claim discovered by the PCRA court, misconceives *Brady*.

I. The FCDO Agenda as Necessary Prologue

As I noted in a recent case involving a retroactive *Atkins*[6] claim raised by the FCDO: The FCDO's significant federal resources, "represented by its cadre of lawyers and roster of experts, are deployed throughout the Commonwealth; individual trial courts, and county prosecutors for that matter, who see only the occasional capital case, may be unaware of the bigger picture, and the strategy at work. This extraordinary shadow capability of the FCDO, and its demonstrated tactics, give me additional pause." *Commonwealth v. Hackett*, 99 A.3d 11, 40-41 (Pa. 2014) (Castille, C.J., concurring). It has only recently emerged just how pervasive a presence the FCDO has made itself in Pennsylvania capital cases. Almost invariably without legitimate court appointment, and without any Pennsylvania authority's approval or role of oversight, this "private" group of federal lawyers pursuing an obstructionist anti-death penalty agenda have

6. *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

essentially anointed themselves as a statewide, *de facto* capital defender's office. Common tactics of the FCDO include multiple attempts to delay and obstruct cases, as well as attempts to unsettle and undermine Pennsylvania law. *See generally Commonwealth v. Spotz*, 99 A.3d 866 (Pa. 2014) (Single Justice Opinion on Post-Decisional Motions by Castille, C.J.) (collecting cases and tactics).

One common tactic is that, immediately after one round of review fails, the FCDO "discovers" a new claim and initiates a new round of delay-inducing review. *See, e.g., id.*; *Commonwealth v. Porter*, 613 Pa. 510, 35 A.3d 4 (Pa. 2012); *Commonwealth v. Abdul-Salaam*, 606 Pa. 214, 996 A.2d 482 (Pa. 2010). In this case, that is exactly what the FCDO did. Appellee already had a full direct appeal, three rounds of PCRA review and appeal, and a full round of federal *habeas corpus* review and appeal when the FCDO happened upon "new" evidence and filed this fourth PCRA petition which, in fact, merely reiterated the same evidence and a theory it had already litigated and which was found to be meritless. The PCRA court below should have decided the claim actually presented to it, while maintaining a proper perspective. And, it has become apparent that PCRA courts throughout Pennsylvania need to be vigilant and circumspect when it comes to the activities of this particular advocacy group, to ensure that the FCDO does not turn PCRA proceedings, and in particular serial proceedings, into a circus where FCDO lawyers are the ringmasters, with their parrots and puppets as a sideshow.

Appendix E

II. The *Brady* Issue Raised by the FCDO was Time-Barred and Frivolous

This fourth PCRA petition was filed by the FCDO in March of 2012, immediately after appellee's federal *habeas* attack on his conviction failed. Appellee's final appropriate prospect for relief was through mercy: the clemency process. The FCDO was appointed to represent appellee for purposes of pursuing state clemency. Nevertheless, the FCDO proceeded to file yet another PCRA petition.

The FCDO alleged prosecutorial suppression of information allegedly provided to the police and the prosecutor during witness preparation sessions by appellee's friend and cohort-in-murder Marc Draper — who was convicted for his own role in the murder and is serving life in prison, who testified contrarily at appellee's trial, and has nothing to lose by now lying for his friend — and the Reverend Charles Poindexter. Draper claimed that he had told the arresting officers, as well as the prosecutor, that the victim, Amos Norwood, was a homosexual, that Norwood and appellee were involved in a sexual relationship, and that the murder was about that relationship. What was obfuscated by Draper and the FCDO was that this information could only have been learned through appellee's own communications with Draper, since appellee obviously knew his "true" motivation; or else it was just Draper's irrelevant opinion. Draper further claimed that police told him to testify that the motive for the murder was robbery. Appellee also included a "declaration" from Poindexter (who had testified for the Commonwealth at the guilt phase of trial),

claiming he had learned from police that the victim would sometimes meet gay men in a house or an apartment.

From this information, the FCDO constructed a claim that the Commonwealth suppressed "exculpatory" evidence of the relationship between appellee and the victim and appellee's supposed "true" motivation for the murder — again, as if appellee himself did not know his own true motivation — which could have been used to rebut elements of first-degree murder and to undermine the death penalty. The argument was akin to a "bad faith" argument, *i.e.*, the Commonwealth had argued that a churchgoing man was robbed and murdered by appellee and Draper, despite knowing that appellee may have had a different relationship with the victim, and a different motivation that he was keeping to himself.

As the Majority explains, the information alleged in this fourth petition not only was obviously known to appellee, but it also was irrelevant to the trial proceedings (the focus of *Brady*) because the defense — offered through appellee's testimony — was one of innocence and non-involvement. In short, appellee chose to lie. In addition, the Draper and Poindexter statements — conveniently secured by the FCDO only after losing in federal court — rehashed the same information concerning the victim's character and appellee's "true" motivation for the murder already litigated in the first PCRA proceeding. Thus, the FCDO's last-ditch *Brady* claim consisted of evidence already known to appellee, a claim already litigated by appellee, and a contrary defense theory springing from an admission that appellee perjured himself at trial. The

PCRA court should have taken the frivolous issue as the FCDO presented it and dismissed it as time-barred. The court inexplicably did not; and instead, the frivolous issue now before this Court is a different *Brady* claim never raised by appellee until prompted to do so by the PCRA court, after the issue was uncovered by the PCRA court itself only by losing sight of fundamental precepts, including its role as neutral arbiter.

III. PCRA Court's "Discovery"

A PCRA court is without jurisdiction when a serial petition is filed (assuming it is filed more than one year from the date the judgment of sentence became final, as it was here) unless it falls within one of three limited exceptions. 42 Pa.C.S. § 9545. In all PCRA petitions, the burden is on the PCRA petitioner to establish an exception to the one-year jurisdictional time-bar, before the court can act. Moreover, the rules governing discovery in PCRA matters explicitly state that no discovery is permitted for first counseled petitions except "upon leave of court after a showing of good cause," Pa.R.Crim.P. 902(E)(2); while in serial cases such as this one, discovery is not permitted "except upon leave of court after a showing of exceptional circumstances." Rule 902(E)(1). These are this Court's Rules: not niceties to be done away with perhaps because of some unease with capital cases.

Nothing in the Rules authorizes a PCRA court to demand the government's thirty-year-old files and for the court itself to go searching for information and new claims — all without jurisdiction being established. This

is true whether the case is a capital case or not — the difference of a death sentence does not create jurisdiction, or derivative power, where it does not exist.

These Rules are neither arbitrary nor mere aspirations. The PCRA Rules square with *Brady*, which does not command an open-file policy, or a "sporting system" of discovery. *See Brady*, 373 U.S. at 90-91. Thus, even where, unlike here, serial petition jurisdiction is established and the petitioner demonstrates exceptional circumstances to warrant some form of discovery, such orders do not properly encompass simply seizing and rummaging about in the government's files.

> [T]he [U.S. Supreme] Court has noted that the duty imposed upon the prosecution under *Brady* is a limited one. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977) ("[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one"); *see also Kyles*, 514 U.S. at 436-37, 115 S.Ct. at 1567 ("[T]he Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.... We have never held that the Constitution demands an open file policy ...."). This Court has also recognized *Brady*'s limited requirements, and has noted that *Brady* does not grant a criminal defendant unfettered access to the Commonwealth's files. *See Commonwealth v. Edmiston*, 578 Pa. 284, 851 A.2d 883, 887 n. 3 (2004) (defendant has no

> general right under the Constitution or *Brady* to search Commonwealth files); *Commonwealth v. Williams*, 557 Pa. 207, 732 A.2d 1167, 1176 (1999) ("[T]he Commonwealth is, in the first instance, the judge of what information must be disclosed.... 'Defense counsel has no constitutional right to conduct his own search of the State's files to argue relevance.'") (quoting *Pennsylvania v. Ritchie*, 480 U.S. 39, 59, 107 S.Ct. 989, 1002, 94 L.Ed.2d 40 (1987)); *Commonwealth v. Counterman*, 553 Pa. 370, 719 A.2d 284, 297 (1998), *cert. denied*, 528 U.S. 836, 120 S. Ct. 97, 145 L. Ed. 2d 82 (1999) (*Brady* is not a general rule of discovery in criminal cases).

Commonwealth v. Lambert, 584 Pa. 461, 884 A.2d 848, 854 (Pa. 2005).

This Court's Rules, likewise and for similar good reason, do not empower a PCRA judge to hold evidentiary hearings in a serial petition case in advance of a demonstration of jurisdiction. Appellee already had five full rounds of review. Hearings are appropriate — after jurisdiction is established — only if there has already been an actual demonstration of a genuine issue concerning any material fact. *See* Pa.R.Crim.P. 908(A)(2), 909(B)(2). A new and different *Brady* claim discovered by the PCRA judge's own unauthorized, and unlimited, "investigation" — conducted after a serial PCRA petition is filed and not yet assessed for jurisdiction — cannot operate to render the petition timely when filed. Likewise, information

obtained from the government's files after the PCRA court improperly ordered seizure of the information without foundation cannot retroactively operate to validate the improper serial petition "discovery" order (or "seizure" order, in this case) in the first instance.

During one of the earliest hearings after an execution date was set in this matter, the PCRA court recognized that Draper's affidavit was insufficient to warrant an evidentiary hearing. Nevertheless, the court essentially directed appellee to procure a third affidavit from Draper to see whether appellee could establish a strong showing of success on the merits which, in the mind of the court, was necessary in order to warrant an evidentiary hearing with a death warrant pending. N.T., 9/10/12, at 86-87. Following submission of the third affidavit, the court then ordered an evidentiary hearing to receive testimony from Draper and the trial prosecutor (who was no longer with the District Attorney's Office). Prior to this hearing, the court entered an order prohibiting the parties from communicating about the case with Draper or the trial prosecutor and further ordered the trial prosecutor to bring any documents in her possession related to the case to the evidentiary hearing. The court then ordered the prosecutor's office to give access to the case files to the trial prosecutor, via an e-mail the judge sent to the parties.

A subsequent e-mail from the court took the even more lawless step of essentially opening the prosecutor's files to appellee's counsel, as the judge directed that appellee was permitted to review any of the documents reviewed by the trial prosecutor. Then, in another e-mail sent on Saturday,

September 22, 2012, the court's clerk directed the Commonwealth to secure the police department's homicide files in this case and the Herbert Hamilton murder case[7] because "the judge wants to review everything in the possession of the police department about these two cases." *See* Attachment to "Commonwealth's Motion to Complete the Record," filed 10/26/12. The PCRA court's examination of these files provided the basis for the examination of the witnesses at the evidentiary hearing, including an extended cross-examination by Judge Sarmina herself.

Ignoring the jurisdictional time-bar and the rules of procedure, and all in a truncated death warrant time-frame leaving little time for appellate review in two court systems, the PCRA court essentially seized the files of the Commonwealth and the police for no legitimate reason (and certainly not based upon the required actual defense showing of exceptional circumstances), independently reviewed the materials, and then used that which was uncovered by the court to examine witnesses at an evidentiary hearing again scheduled for no legitimate reason. The court also entered some of the documents into the record on its own without any motion or prompting by appellee. Only thereafter, during the September 25th hearing, did appellee ask permission to amend the fourth PCRA petition to include the new allegations raised by the documents the judge had found, and the court immediately granted the request, reasoning that

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7. Herbert Hamilton, another older man with whom appellee had a sexual relationship, was the first person appellee murdered.

Appendix E

Chapter 900 of the Rules of Criminal Procedure — the same chapter containing the Rules respecting discovery and evidentiary hearings that were of no concern to the judge — supposedly indicated that there should be a liberal ability to amend, "even if it is at this late stage." N.T., 9/25/12, at 78.

Unfortunately, the PCRA court apparently allowed itself to be compromised by the fact that this was a capital case that was proceeding under an execution warrant. But, that is what happens, thirty years on, after a condemned capital petitioner has already exhausted five full rounds of review, and his federal lawyers try another longshot at delaying the case. Also, in taking these extreme, activist measures, the court cited a belief — proper enough in some spheres, and thus recognized in specific doctrines — that "death is different." The judge added: "This is not any regular, old PCRA, including in a non-capital case." N.T., 9/14/12, at 69. No, it was not an ordinary case, but not for the reason cited by the court: it was a last-ditch fourth state collateral petition, filed by the FCDO no less, after federal review had concluded, rehashing old claims that just happened to involve a two-time murderer finally facing the execution of his sentence.

This case demonstrates that the "difference of death" when reduced to an unmoored slogan causes mischief. The slogan does not create PCRA jurisdiction, and jurisdiction must be proven before the PCRA court can act. The difference of death is not a ground for ignoring this Court's Rules of Procedure, which specifically apply to — and in many instances exist specifically because of — capital

cases. The difference of death also does not alter a trial court's crucial role as a neutral arbiter to pass upon the timeliness, and if timely, the merits of the claims that a serial PCRA petition actually raises. Five Ninth Circuit jurists recently commented on the abuse of the "death is different" notion in a dissent, explaining that the rule of law must be paramount:

> Whatever they are, motivations are beside the point. We should follow the law. Instead, we lay flame to orderly case-processing rules, comity due to state court judgments, and principles of finality. "[Fire's] real beauty is that it destroys responsibility and consequences. A problem gets too burdensome, then into the fire with it." Ray Bradbury, *Fahrenheit 451* 109 (Simon & Schuster 2012). We should be more cautious.

Henry v. Ryan, 766 F.3d 1059, 1072 (9th Cir. 2014) (Tallman, J., dissenting, joined by O'Scannlain, Callahan, Bea, & Ikuta) (dissenting from grant of *en banc* review in case where time for Circuit reargument had long passed, and U.S. Supreme Court had already denied *certiorari*). Ultimately, the PCRA court here lost sight of its limited, albeit crucial, role.

As a consequence, the PCRA court steered its own course away from the actual *Brady* claim presented in this time-barred serial petition; and the *Brady* claim forming the basis for the penalty phase relief the PCRA court granted could not retroactively establish jurisdiction so as to justify the lawless discovery and evidentiary

hearing that had already occurred per the court's *sua sponte* directives. To make matters even worse, the claim the court discovered on its own was simply a different, frivolous *Brady* claim.

IV. *Brady* Law

The 1984 murder here was appellee's second murder. His first murder victim, Herbert Hamilton, was another man with whom he had a sexual relationship, a relationship appellee denied. At the trial in this case, appellee testified to his absolute innocence, claiming he did not even know the victim. As all now agree, this sworn testimony was a lie since appellee not only knew the victim, but he had an ongoing homosexual relationship with him. But, it is the story appellee elected to tell the jury in the hopes, however desperate, of an acquittal. It is not the first time a criminal defense was premised upon a lie, but it is a defendant's right to pursue the defense he chooses (even if it risks a subsequent perjury prosecution, which is hardly a disincentive to a serial murderer in appellee's circumstances).

The new *Brady* claim discovered by the PCRA court's efforts involved "dirt" about the victim: that he was a "homosexual ephebophiliac" who had sexual encounters with male teenagers. Specifically, as explained by the Majority, the claim was that information that the victim was a homosexual ephebophiliac could have been employed to paint an unsympathetic picture of the victim at the penalty phase. Majority Slip op. at 17. Nothing in the death penalty statute, however, makes slander about a victim a

relevant consideration. The death penalty statute does not recognize an exception if the murder victim was a sexual deviant, or even a convicted sex offender; and smearing the victim's character would not rebut the two aggravators the jury found: the commission of a felony (robbery) along with the murder, and the significant history of violent felony convictions, which included the murder of Hamilton, and a Christmas Eve, home invasion gunpoint robbery of an older couple — where appellee pressed a rifle to the woman's neck and threatened to blow "her fucking head" off, and then fired multiple shots into the wall. Nor would such evidence be probative of a mitigating circumstance. *See Commonwealth v. May,* 587 Pa. 184, 898 A.2d 559, 566 (Pa. 2006) (testimony designed only to smear murder victim's character not relevant; noting as "apt" trial court's analysis that: "it's just as illegal to kill the devil as it is to kill a saint"). And, when the defendant takes the stand and swears he had nothing to do with killing the victim, and did not even know him, it clearly limits his penalty phase options respecting mitigation arising from "the circumstances of the offense."

The linking assumption depends upon a pet *Brady* theory the FCDO has been raising recently, *i.e.*, that *Brady* is violated by non-disclosures which, though involving information neither exculpatory nor material in and of itself, in hindsight might have been used by trial counsel to keep the defendant from testifying and perjuring himself, thereby altering the focus of the necessary *Brady* materiality inquiry. *See Commonwealth v. Weiss,* 622 Pa. 663, 81 A.3d 767 (Pa. 2013) (Castille, C.J., concurring, joined by Eakin J.) (further discussed

and quoted *infra*). In the iteration posed here, the theory goes something like this: had additional information about the victim been disclosed, the defense would have learned appellee's "real" motive for murder (again, as if appellee did not know his motive), and perhaps trial counsel could have convinced appellee not to take the stand and lie, thus opening the door to an attack-the-victim defense at the penalty phase. Even setting aside the irrelevancy of bad character information about a murder victim, *Brady* does not embrace this sort of perversity, a theory that rewards the defendant's trial perjury.

Furthermore, even if the PCRA court found something "unsporting" about the government's conduct revealed in the government's files that the court seized, and even if evidence of poor "sportsmanship" in discovery angered the judge, that is not the basis for a *Brady* claim. What matters is the legal point, made by the Majority, that there was nothing exculpatory or material in this information.[8]

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8. In concisely summarizing why the PCRA court erred in finding that appellee's reconfigured-by-the-PCRA-court claim did not qualify under the governmental interference exception, based upon information appellee himself had known before trial, and supplemental information which he secured for use in a prior PCRA petition over fifteen years before, the Commonwealth succinctly explains:

> When, at trial, defendant considered it in his interest to deny any sexual relationship with his victims so as to distance himself from their deaths, he made the strategic decision, **independent of any information in the government's possession**, to do so. And when that did not work, and he decided it was in his interest

Appellee always knew of the victim's supposed proclivities; again, the current claim is just another version of the claim raised and litigated by the FCDO fifteen years ago. Nevertheless, the PCRA court drew a legal conclusion that the evidence respecting the victim was subject to *Brady* disclosure before the 1986 trial; and, if only the prosecution had disclosed non-exculpatory information already known to appellee about the victim's character, it may have changed appellee's guilt phase decision to testify; and, the theory goes on in speculation, may have altered the outcome of the penalty proceeding. *See* Appellee's Brief, at 29-30 (quoting PCRA court opinion).[9]

> to instead claim in his first PCRA petition that he killed the victims [both here and in the Hamilton case] because they sexually abused him, he had no difficulty marshalling evidence **outside the government's possession** to support that version of events. At no point was his ability to defend against the charges, or to present any claim, constrained by the actions of the trial prosecutor or any other government official. Consequently, his untimely fourth PCRA petition, which he filed more than twenty years after his judgments of sentence became final, did not satisfy the governmental-interference exception to the one-year filing deadline. His petition was time-barred, and the PCRA court's order purporting to grant relief was a jurisdictional nullity that should be reversed.

Commonwealth's Brief as Appellant, 34 (emphasis original).

9. In point of fact, appellee never so much as offered to prove that, but for the alleged non-disclosure, he would have presented evidence detailing his ongoing, prior sexual relationship with the victim, and then claimed that the relationship was why he murdered the victim. Furthermore, the decision to testify was defendant's

The notion that this sort of evidence, in the context of a trial where appellee testified and denied any involvement, warrants *Brady*-based penalty phase relief, is ludicrous.

As the Majority notes, the U.S. Supreme Court has never held that *Brady* materiality is measured by the FCDO's effect-on-the-defense-trial-strategy theory; and a serial collateral attack is not the proper place to establish such constitutionally innovative new rules. Moreover, it would be absurd to grant *Brady* relief upon a claim that would involve rewarding a defendant for his own deliberate perjury at trial. I explained the error in this theory in my Concurring Opinion in *Weiss*:

> The *Brady* analysis argued by appellant is erroneous for several reasons. First, the U.S. Supreme Court has never embraced his interpretation. Indeed, appellant's claim to the contrary is premised upon a mischaracterization

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alone; his trial counsel's role was limited to consultation. In this regard, it is notable that, in the prior PCRA proceeding, where appellee litigated the same basic claim, trial counsel testified that he had negotiated a plea deal where appellee would receive life in prison — the best possible circumstance where appellee faced the death penalty, had substantial aggravators, and the fact of the robbery meant that his best, realistic prospect was a conviction for second-degree murder, which carries a mandatory life sentence. Counsel consulted with appellee. But, counsel testified, appellee was adamant that he was not willing to exchange his prayer of a hope for an outright acquittal for a term of life imprisonment. Appellee told counsel he would rather be executed than spend his life in jail. No claim but innocence could lead to acquittal, and appellee decided to go that route by then perjuring himself.

of *United States v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Appellant states the following proposition as if it were black-letter law: "The proper *Brady* inquiry asks what 'course that the defense and the trial would have taken had the defense not been misled' and what impact the misconduct had on 'the preparation or presentation of the defendant's case.' *Bagley*, 473 U.S. at 683, 105 S.Ct. 3375." . . . From his assertion that mere effects upon defense preparation, rather than hard evidence, is the measure of *Brady* materiality, appellant argues his more radical extended rule that he may shield himself from his own prior testimony.

However, *Bagley* supports neither appellant's "defense effects" root rule, nor his testimonial immunity extension of the rule. Appellant's [FCDO] counsel neglect to note that the *Bagley* language they cite and quote as governing black-letter law in fact represented the views of only two Justices in *Bagley*. It is not governing law. I examined and explained the non-precedential effect of this language at some length in my concurring opinion in *Commonwealth v. Willis*, 616 Pa. 48, 46 A.3d 648 (2012), a direct appeal case. *See id.* at 674-84 (Castille, C.J., concurring, joined by Eakin and McCaffery, JJ.) (addressing Court's erroneous apprehension of *Brady* materiality in *Commonwealth v. Green*, 536 Pa. 599, 640 A.2d 1242, 1245 (Pa. 1994)).

Moreover, nothing in the logic of *Brady* materiality suggests a design to shield a defendant from his prior testimony or perjury. The test for *Brady* materiality is the same as the test for *Strickland [v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)] prejudice: whether there is a reasonable probability that the outcome of the proceeding would have been different. *See Kyles v. Whitley*, 514 U.S. 419, 433-35, 115 S.Ct. 1555, 131 L.Ed.2d 490 (U.S. 1995) (noting that *Bagley* adopted *Strickland* formulation for *Brady* claims). The test, whether for *Brady* or *Strickland*, looks to the proceeding that actually occurred and attempts to assess its underlying fairness. *See id.* at 451, 115 S.Ct. 1555; *see also Bagley*, 473 U.S. at 678, 105 S.Ct. 3375. The High Court has never held that courts, charged with assessing *Brady* materiality by re-examining the trial that occurred in light of previously suppressed evidence, are obliged to diminish the record at that trial. Accordingly, appellant's theory is a non-starter. The expansion, if there is to be one, should come from the High Court.

Second and relatedly, this is a PCRA appeal. An assessment of the fairness of appellant's trial — whether he poses a *Brady* claim, a *Strickland* claim, or any other claim — is not measured by minority views in prior decisions or by hopeful predictions of where federal decisional law might someday go; it is measured by the

existing law that governs. The only federal decisional law that governs in Pennsylvania is that commanded by the U.S. Supreme Court .... And, errors in such predictions [of where the law might develop] favoring the defense run the risk of arbitrarily releasing murderers.

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Finally, I believe it is extremely unlikely that the U.S. Supreme Court would adopt a *Brady* materiality extension ... which would immunize a defendant against the effects of his own trial testimony, much less his own false trial testimony. To borrow from the *Strickland* jurisprudence from which *Brady* materiality derives:

> It is true that while the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims, there are situations in which the overriding focus on fundamental fairness may affect the analysis. Thus, on the one hand, as *Strickland* itself explained, there are a few situations in which prejudice may be presumed.... And, on the other hand, there are also situations in which it would be unjust to characterize the likelihood of a different outcome as legitimate

> "prejudice." Even if a defendant's false testimony might have persuaded the jury to acquit him, it is not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. *Nix v. Whiteside*, 475 U.S. 157, 175-176, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986).
>
> Similarly, in [*Lockhart v. Fretwell*, 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993)], we concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate "prejudice" contemplated by our opinion in *Strickland*.... Because the ineffectiveness of Fretwell's counsel had not deprived him of any substantive or procedural right to which the law entitled him, we held that his claim did not satisfy the "prejudice" component of the *Strickland* test.

Williams v. Taylor, 529 U.S. 362, 391-93, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (citations and footnotes omitted). *Cf. Commonwealth v. Cox*, 581 Pa. 107, 863 A.2d 536, 556-

> 57 (2004) (Castille, J., concurring) (strong argument to be made that heightened prejudice standard under *Lockhart* should be applied to ineffectiveness claims with "fundamental substantive issues that would have to be resolved in defendant's favor before relief could be granted"); *United States v. Day*, 285 F.3d 1167, 1171 (9th Cir. 2002) ("Because a defendant does not have a 'right' to commit perjury without suffering the consequences, the fact that counsel's ineffectiveness gave [defendant] an opportunity to commit perjury does not constitute deprivation of a right; accordingly, this portion of the sentence does not satisfy the prejudice component of *Strickland*."). Again, in explicating both *Brady* and *Strickland*, the High Court has stressed the overriding concern of whether the defendant has received a fair trial. Fairness works two ways, the High Court teaches. When the defendant takes the stand and elects to testify, and then testifies absurdly or untruthfully, I doubt that the U.S. Supreme Court would hold that *Brady* requires courts to pretend that his testimony never existed.

Weiss, 81 A.3d at 810-13 (Castille, C.J., concurring, joined by Eakin, J.) (footnotes omitted).

For these specific reasons, in addition to those set forth by the Majority on the time-bar and the merits, the new *Brady* claim fashioned by the PCRA court here provides no grounds for serial petition jurisdiction, much less PCRA relief.

V. Conclusion

The FCDO's agenda and tactics by now should be predictable: this group has been aptly described, by a federal judge, as "gaming a system and erecting roadblocks in aid of a singular goal — keeping [the defendant] from being put to death." *See Abdul-Salaam v. Beard*, 16 F. Supp. 3d 420, 511 (M.D. Pa. 2014). That gaming is bad enough; but, what is disheartening here is that the PCRA court became unmoored from its lawful duty. Trial courts faced with serial petitions in capital cases must be vigilant to protect against frivolous claims, and must be aware of their own actual duties; the PCRA judge here was not.

APPENDIX F — OPINION OF THE PHILADELPHIA COURT OF COMMON PLEAS, SUPPORTING THE GRANT OF PENALTY-PHASE RELIEF, DATED NOVEMBER 27, 2012

PHILADELPHIA COURT OF COMMON PLEAS CRIMINAL TRIAL DIVISION

CP-51-CR-0823621-1984

Supreme Court Docket No.:
669 CAP

COMMONWEALTH OF PENNSYLVANIA

v.

TERRANCE WILLIAMS

Sarmina, J.
November 27, 2012

OPINION

PROCEDURAL HISTORY

On February 3, 1986, a jury convicted Terrance Williams (appellee) of first-degree murder (H-1), robbery (F-l) and criminal conspiracy (F-1) in the killing of Amos Norwood (victim).[1] After a penalty hearing that same day, the jury found two aggravating circumstances,[2] no

1. 18 Pa.C.S. §§ 2502(a), 3701, and 903, respectively.

2. The two aggravating circumstances found by the jury were

mitigating circumstances,[3] and returned a verdict of death on February 4, 1986.[4] Appellee filed post-trial motions, which were denied in a formal opinion by the Honorable David N. Savitt on July 28, 1987,[5] and then the judgments of sentence were affirmed by the Pennsylvania Supreme Court on February 8, 1990. *Commonwealth v. Williams*, 570 A.2d 75 (Pa. 1990) ("*Williams I*").

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that appellee committed the killing while perpetrating a felony and that he had a significant history of felony convictions involving the use or threat of violence to the person. 42 Pa.C.S. §§ 9711(d)(6) and 9711(d)(9), respectively. The Commonwealth introduced evidence of appellee's convictions for burglarizing the home of Hilda and Donald Dorfman, and killing Herbert Hamilton, for which he was tried and convicted of third degree murder in February 1985.

3. Appellee's trial counsel, Nicholas Panarella, Esquire, presented mitigating evidence of appellee's youth at the time of the crime and his character and record. 42 Pa.C.S. §§ 9711(e)(4); 9711(e)(8). Mr. Panarella did not make any argument with respect to the victim at the penalty phase. Notes of Testimony (N.T.) 2/3/1986 at 1877-81.

4. On July 1, 1987, appellee was formerly sentenced to death on the first degree murder charge, to a term of not less than five nor more than ten years on the conspiracy charge, and to a term of not less than ten nor more than 20 years on the robbery charge. N.T. 7/1/1987 at 72-74. The conspiracy and robbery sentences were to run concurrent with the death penalty sentence, but consecutive to one another.

5. *Commonwealth v. Williams*, No. 2362-37, slip op. (Pa. Ct. Com. Pl., July 28, 1987). Judge Savitt was the trial judge, and presided over and decided the PCRA petition appellee filed in 1995.

Appendix F

Appellee filed a *pro se* petition pursuant to the Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541 *et seq.* on March 24, 1995.[6] The PCRA Court denied the petition on October 20, 1998.[7] On December 22, 2004, our Supreme Court affirmed the PCRA Court's decision. *Commonwealth v. Williams*, 863 A.2d 505 (Pa. 2004) ("*Williams II*"). Appellee subsequently filed a second PCRA petition on February 18, 2005, which was dismissed as untimely under 42 Pa.C.S. § 9545.[8] Our Supreme Court affirmed this dismissal, without an opinion, on September 27, 2006. *Commonwealth v. Williams*, 909 A.2d 297 (Pa. 2006).

In July of 2005, appellee filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Pennsylvania. On May 9, 2007, the Honorable Michael M. Baylson denied appellee's petition for writ of habeas corpus pursuant to § 2254, but granted a certificate of appealability, pursuant to 28 U.S.C. § 2253(c)(2) with respect to two issues - whether trial counsel was

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6. Appellee's current counsel first appeared on appellee's behalf on May 14, 1996, and filed an Amended Petition on December 17, 1996.

7. Judge Savitt's formal opinion denying this PCRA petition was filed on January 13, 1999. *Commonwealth v. Williams*, No. 2362-67 slip op. (Pa. Ct. Com. Pl., Jan. 13, 1999).

8. *Commonwealth v. Williams*, No. 2362-67, slip op. (Pa. Ct. Com. Pl., May 26, 2005). In this petition, appellee claimed that the accomplice liability instruction allowed the jury to find appellee guilty of first degree murder without finding that he possessed the specific intent to kill.

constitutionally ineffective during the penalty phase of trial and whether the Commonwealth exercised its peremptory strikes in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). *Williams v. Beard*, 2007 U.S. Dist. LEXIS 41310, ** at 182-83. On March 9, 2011, the Third Circuit found that the *Batson* claim failed on its merits. *Williams v. Beard*, 637 F.3d 195, 219-20 (3d Cir. 2011). With respect to the ineffective assistance of counsel claim, the Third Circuit held that our Supreme Court's determination that appellee was not prejudiced by trial counsel's constitutionally deficient failure to present the mitigating evidence presented at the 1998 PCRA evidentiary hearings was not an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984).

The present litigation evolved roughly ten months after the Third Circuit's March 9, 2011 decision.[9] On January 9, 2012, appellee's counsel visited Marc Draper (Draper), the co-defendant in the Norwood killing and a principal Commonwealth witness at appellee's trial, while he was serving a life sentence for that killing at SCI-Frackville.[10] Draper signed a declaration pursuant to 18

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9. Appellee's petition for rehearing in the Third Circuit was denied on July 26, 2011. Appellee then prepared and filed a petition for writ of *certiorari* in the United States Supreme Court. The petition was filed on December 13, 2011 and denied on June 29, 2012 *sub nomine*. *Williams v. Wetzel*, 2012 U.S. LEXIS 4903 June 29, 2012).

10. Draper pleaded guilty to second degree murder before Judge Savitt on February 21, 1986 for his role in the killing of Amos Norwood. He was represented by Harry Seay, Esquire. N.T. 2/21/1986 at 1.

Pa.C.S. § 4904, in which he stated, for the first time that, during a prep session prior to trial, he told detectives that the victim was a homosexual who was in a relationship with appellee. *Declaration of Marc Draper*, 1/9/2012 at 4. (See Attachment A, which is pages 11-17 of Exhibit P-16 in the PCRA hearing before this Court). Draper also stated that the detectives "wanted the motive to be a robbery and kept coming back to that. That's how they wanted me to testify, that it was a robbery." *Id.* Appellee's counsel returned to SCI-Frackville on March 1, 2012 and obtained another signed declaration from Draper. On the basis of those two statements, appellee flied the instant PCRA petition on March 9, 2012 and an Appendix to the petition on July 16, 2012.[11]

On July 24, 2012, appellee filed Petitioner's Memorandum, in which he argued that this PCRA Court should advise Governor Corbett that he need not sign an execution warrant in this case.[12] On July 27, 2012, appellee supplemented his Memorandum with Petitioner's

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11. Appellee filed his current PCRA petition through counsel, the Federal Community Defender Office for the Eastern District of Pennsylvania ("FCDO"), who has represented him since 1996. Billy H. Nolas, Esquire, Shawn Nolan, Esquire, Eric Montroy, Esquire, and Jennifer Givens, Esquire entered appearances on appellee's behalf before this Court. Robin Godfrey, Esquire, Cari Mahler, Esquire and Ronald Eisenberg, Esquire entered appearances on the Commonwealth's behalf before this Court.

12. Judge Sonitt having retired, this PCRA matter was officially assigned to this Court on May 23, 2012. Based on the way in which the Post Trial Unit processes the PCRA paperwork, this Court first received the pleadings on or about July 24, 2012.

Appendix F

Supplemental Petition for Post Conviction Relief and Notice of Filing Additional Evidence in Support of Stay of Execution along with an Appendix to that filing. The Commonwealth responded on July 31, 2012, filing a Brief in Opposition to Motion to Stay.

On August 6, 2012, this Court briefly heard argument on the issue raised in appellee's July 24, 2012 Memorandum that this Court should advise Governor Corbett not to sign appellee's execution warrant. However, at the hearing, appellee orally withdrew the request in light of the Commonwealth's representation that Governor Corbett planned to sign appellee's execution warrant three days later, on August 9, 2012. N.T. 8/6/2012 at 4-5. The Governor signed the warrant on August 8, 2012, and scheduled the execution for October 3, 2012.

On August 28, 2012, appellee filed Petitioner's Renewed Motion for Stay of Execution, citing public policy reasons to stay appellee's scheduled execution.[13] On September

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13. *Commonwealth v. Morris*, 771 A.2d 727, 739 (Pa. 2001) ("Morris I") clearly dictates that trial courts do not have discretion to go beyond the corners of 42 Pa.C.S. § 9545(c) when determining whether or not to grant a stay of execution:

> Given that we have concluded that § 9545(c) does not violate either Article V, § 9 or 10 of the Pennsylvania Constitution and is therefore, within constitutional restraints, we hold a lower court may not exercise its inherent right to grant a stay except within the confines enumerated by § 9545(c). We are mindful of the fact that such a conclusion may seem harsh, especially where death is the ultimate result of the denial of relief in these instances, but we cannot

6, 2012, appellee filed a Motion for Discovery, requesting "any information relating to Marc Draper, Reverend Poindexter, and any informal or formal documentation pertaining to any of Marc Draper's other offenses, including, but not limited to, the Donna Friedman case" from the police homicide file.[14] *Petitioner's Motion for*

> ignore that at some point in the proceedings society's interest in finality becomes overarching. Accordingly, we conclude that a PCRA court is bound by the requirements of § 9545 and can only enter a stay when it has reasonably concluded that such requirements are met.

Despite our Supreme Court's landmark decision prohibiting trial courts from allowing factors beyond the scope of § 9545(c) to enter into the equation as to whether granting a stay of execution is appropriate, appellee's counsel exerted an enormous amount of time and resources to persuade this Court that public policy considerations merited entering a stay of execution. While a statement from the decedent's spouse and support from a myriad of sources might have been pertinent to a clemency proceeding, this Court found appellee's documentary support and oral argument in this regard to be irrelevant and a waste of the Court's time. And the Court agreed with the Commonwealth's position that seeking advisory opinions from the trial jurors as to what their verdict at the penalty phase would have been – if they had been told that the victim had molested appellee – was inappropriate and improper for a number of reasons.

14. Donna Friedman, a pregnant woman who lived in the Mt. Airy section of the city, was murdered on July 3, 1984. Police were doggedly trying to solve her murder – which remains unsolved to this day – and considered Draper and appellee suspects. In the PCRA evidentiary hearing before this Court, Draper maintained that, on July 20, 1984 – the day he was arrested for this involvement in the

Discovery, 9/6/2012 at 5. Additionally, appellee requested the production of exculpatory information contained in the Commonwealth's "secure archive"[15] as well as "any reports or notes made concerning Norwood's sexual relationship or sexual abuse of petitioner or any other child under the age of 18." *Id.* at 5-6. The Commonwealth filed its Motion to Dismiss and Opposition to Stay of Execution on September 7, 2012.

On September 10, 2012, this Court heard argument on the pleadings, and permitted appellee the opportunity to obtain and submit additional information from Draper by September 13, 2012 at 5 P.M.[16] N.T. 9/10/2012 at 101-02. The following day, this Court heard the Commonwealth's

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Norwood case – police threatened him with the death penalty for having killed Ms. Friedman. N.T. 9/20/2012 (P.M.) at 182-88. He stated that the threat of being charged with the Friedman murder was one of the reasons why he cooperated with police, and why he refrained from speaking about the Norwood murder over the years. *Id.* at 188-89. This Court found that testimony credible, and considered it as part of the determination regarding jurisdiction under 42 Pa.C.S. § 9545(b), as discussed *infra*.

15. The Commonwealth represented to this Court that it filed "secure archive information" during the federal habeas corpus litigation of this case. According to the District Attorney's Office, it was an "old mental health evaluation" in microfilm "maintained by a court or some agency, not by the Commonwealth or the police," and there was "no overlap" between that evaluation and the evidence uncovered during this PCRA litigation. N.T. 9/24/2012 at 5-6.

16. At the conclusion of the September 10, 2012 argument, appellee, who had been brought in from SCI-Greene, agreed to waive his presence at all future hearings. N.T. 9/10/2012 at 108.

argument that Draper should be appointed counsel prior to appellee's counsel being permitted to speak with him. N.T. 9/11/2012 at 8-10. The Commonwealth's motion to have counsel appointed for Draper was denied. *Id.* at 17. Appellee's counsel obtained and filed Draper's third statement, an affidavit, on September 11, 2012. (See Attachment B, which is pages 1-10 of Exhibit P-16 in the PCRA hearing before this Court).

On September 14, 2012, this Court heard further argument from appellee as to the timeliness of the current petition, after which this Court found that there was an issue of material fact meriting an evidentiary hearing pursuant to Pa.R.Crim.P. 909(B)(1) in order to determine whether government officials pressured Draper to testify that appellee's motive for the crime was to rob Amos Norwood, not to kill him because of a homosexual relationship between them. The evidentiary hearing was scheduled for September 20, 2012; Draper and Andrea Foulkes, the trial prosecutor, were the only two witnesses expected to testify.[17] Additionally, in an effort to ensure that potential pre-hearing preparation did not interfere with the credibility determinations that this Court would ultimately have to make, this Court

17. Pa.R.Crim.P. 909(B)(3) requires that an evidentiary hearing be scheduled no fewer than ten days nor more than 45 days after the date of the order setting a date certain for the hearing. In light of the extenuating circumstances in this case – merely 18 days separated the September 14, 2012 argument from the impending execution – this Court scheduled the evidentiary hearing six days after that argument. Neither party objected to the expedited evidentiary hearing.

prohibited both parties from communicating with the two witnesses prior to the hearing.[18] *Order to Comply*, 9/14/2012. On September 18, 2012, this Court ordered that the Commonwealth produce the trial files for the two cases which Ms. Foulkes prosecuted against appellee in 1985 and in 1986, and in which Draper was the key Commonwealth witness – the Herbert Hamilton and Amos Norwood murders, respectively.[19]

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18. As soon as this Court granted an evidentiary hearing, the Commonwealth's attorneys handed up a writ to have Draper, whom they had already requested to be sent from SCI-Frackville to SCI-Graterford, be transported by District Attorney's Office detectives to their office to be interviewed. N.T. 9/14/2012 at 71. The Court declined to issue the writ, but had concerns that "prepping" the two witnesses expected to testify would affect their recollection and spontaneity when testifying before this Court. *Id.* at 83-84. For this reason, the Court entered an order prohibiting any communication between counsel and the two witnesses. Prior to this Court's Order prohibiting such communication, the Commonwealth had provided Ms. Foulkes, now an Assistant United States Attorney in the Eastern District of Pennsylvania, with a CD that contained all of the pleadings relevant to the instant litigation as well as the Notes of Testimony from all hearings dating back to the Herbert Hamilton trial. N.T. 9/20/2012 (P.ML) at 34. The contents of the CD are listed in Attachment C. When this Court issued its Order, Ms. Foulkes was asked to turn over the CD, which she did. Ms. Foulkes had asked for an opportunity to review the two files to which she had been assigned, and she was permitted to do so. But this Court found that what was on the CD went well beyond that.

19. The Commonwealth did not object to this Court's directive that the trial files be produced. Both sides had an opportunity to go through these files and mark documents that they intended to utilize at the evidentiary hearing before this Court. The only aspect of the files exempted from disclosure and review was the trial prosecutor's notes regarding jury selection. This Court reviewed those files *in camera* and found them irrelevant to the instant matter other than

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This Court conducted the evidentiary hearing on September 20 and September 24, 2012. On Saturday, September 22, 2012, this Court directed that the Commonwealth also produce the Philadelphia Police Department's files concerning the same two cases.[20] After Draper's testimony concluded on the 24th, both sides were given an opportunity to look through those police files. On September 25, 2012, the documents uncovered during the parties' review, as well as during the Court's independent review of same, were introduced into evidence.[21] Having filed Petitioner's Motion to Conform the Petition to the Hearing Evidence and to Supplement and Amend on September 24, 2012, appellee reiterated this on September 25, 2012, making an oral motion to "conform the [appellee's] proof to the evidence submitted at the hearing and to have [the Court] allow us to take the

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as discussed in the Appendix.

20. The Philadelphia Police Department provided First Assistant District Attorney Edward McCann two boxes, labeled H-84-026 (Herbert Hamilton victim) and H-84-127 (Amos Norwood victim). "H" stands for Homicide, "84" stands for the year, and the last numbers represent which murder case it was, chronologically. Mr. McCann had the two boxes immediately transported to this Court. Again, the Commonwealth did not object to this Court ordering their production and inspection.

21. The information uncovered from the District Attorney's files and the Philadelphia Police Department's files will be referred to in this Opinion collectively as the "government's files," based on the holding in *Kyles*, that prosecutors have a duty to learn of any favorable evidence known to others "acting on the government's behalf in this case, including the police." *Kyles v. Whitley*, 514 U.S. 419, 437 (1995); *Commonwealth v. Gibson*, 951 A.2d 1110, 1127 (Pa. 2008); *Commonwealth v. Burke*, 781 A.2d 1136, 1142 n.5 (Pa. 2001).

testimonial evidence from the hearing and the documents from the hearing as an amendment and supplement to our petition." N.T. 9/25/2012 at 51. This Court granted appellee leave to amend.[22] *Id.* at 77. Thereafter, appellee in fact amended his PCRA petition, filing an Amendment and Supplement to Petition for Post-Conviction Relief on the morning of September 28, 2012, wherein he asserted, among other things, that the Commonwealth presented the jury with "sanitized characterizations of the victims in this case," and argued for relief on the basis of *Cone v. Bell*, 556 U.S. 449 (2009) and *Banks v. Dretke*, 540 U.S. 668 (2004). Subsequent to that filing on September 28, 2012, this Court ruled on appellee's issues, denying all guilt-phase issues but granting relief in the form of a new penalty phase hearing for the reasons discussed below.[23]

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22. *See* Pa.R.Crim.P. 905(a) ("The judge may grant leave to amend or withdraw a petition for post-conviction collateral relief at any time. Amendment shall be freely allowed to achieve substantial justice.").

23. As a necessary component to the Court's ruling, the Court was constrained to conclude that the trial prosecutor was less than candid when testifying at the September 2012 PCRA evidentiary hearing. Based on her testimony concerning the two cases which she prosecuted against appellee, this Court ultimately concluded that the trial prosecutor engaged in "gamesmanship," knowingly suppressing evidence that she believed was substantially similar to that which led to a compromise verdict in the Hamilton case. Intentionally rooting evidence out of the Norwood prosecution in order to secure a first degree murder conviction and death penalty sentence constitutes "gamesmanship." Some of the credibility determinations that led this Court to that conclusion are delineated and discussed in the body of this Opinion. The Court has also attached an "Appendix," detailing how Ms. Foulkes' testimony

The Court also entered an Order staying appellee's execution.[24]

FACTS

The facts presented at trial substantiating appellee's first degree murder, robbery and criminal conspiracy convictions have been presented in detail by our Supreme Court and by the Third Circuit. *Williams I*, 570 A.2d at 77-79; *Williams*, 637 F.3d at 198-202. The basic facts underlying appellee's conviction for the murder of Amos Norwood are as follows[25]:

On Monday, June 11, 1984, appellee met Draper at Mount Pleasant Avenue and Lincoln Drive to gamble with a few other friends. N.T. 1/22/1986 at 665. After gambling

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before this Court and instances from her prosecution of appellee led to this Court's credibility determinations. The Appendix is explicitly made a part of this Opinion and is incorporated herein by reference.

24. On September 28, 2012, this Court found that the other claims raised by appellee in his March 9, 2012 petition with respect to CP-51-CR-0823621-1984 (Norwood case) were without merit. N.T. 9/28/2012 at 12-13. A notice of appeal regarding those rulings was filed on October 25, 2012, but a docketing number has not yet been assigned for that cross-appeal. A separate opinion regarding that appeal will be filed in due course. This Court did not make any decision with respect to CP-51-CR-0907971-1984 (Hamilton case), as the focus was on the matter in which Governor Corbett had signed an execution warrant which was to be effectuated on October 3, 2012.

25. Draper was the sole Commonwealth witness to testify about the events leading up to Amos Norwood's death.

for close to an hour, the pair ran out of money. *Id.* at 666. Appellee told Draper that "he had an idea that he knew somebody around the corner to get some money from." *Id.* at 667. Appellee explained to Draper that this source of money was a man he knew named Amos, whom he had met at a bar downtown. *Id.* Appellee told Draper that he was "going to try to extort him by telling his wife that he was a homosexual." *Id.* at 667-68. The two walked together towards this man's home; however, before they arrived at their destination, appellee told Draper to wait at the top of the street while appellee entered the home. Draper estimated that he had to wait for 20 minutes before he saw appellee emerge with $10 in hand. *Id.* at 668-69. As Draper asked appellee about the money, a woman walked past them towards the Norwood home; appellee told Draper that woman was Mr. Norwood's wife. Appellee said, "Excuse me, Miss, excuse me, Miss," but the woman did not hear him. *Id.* at 670.

The pair then returned to the corner where they had been gambling. Roughly ten minutes later, appellee stood up and said, "There goes my uncle,"[26] as Mr. Norwood drove past the group. *Id.* at 671. Appellee ran to the car, got in, and drove off with Mr. Norwood on Lincoln Drive. *Id.* They returned a few minutes later, and appellee stepped out of the car. He walked to Draper and told him to get in the car and "play it off like you going home, like

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26. A the PCRA evidentiary hearing before this Court, Ms. Foulkes testified that, from her prosecution of appellee for killing Herbert Hamilton, she understood the term "uncle" to be a term of "familiarity." In the Hamilton trial, Antonio Williams had referred to his older homosexual lover, decedent Herbert Hamilton, as his "uncle." N.T. 9/20/2012 (A.M.) at 16-19.

you want a ride home, and we gonna take some money." *Id.* at 672. Once he sat in the backseat, Draper gave Mr. Norwood "phony directions," directing the car towards a dark street adjacent to a cemetery. Around that time, Draper grabbed Mr. Norwood from his position in the backseat and appellee ordered Mr. Norwood out of the car. *Id.* at 673-74. At appellee's direction, the three men walked towards the edge of the cemetery. Appellee jumped the fence into the cemetery first, followed by Mr. Norwood and then Draper. *Id.* at 674. After walking into the dark, appellee told Mr. Norwood to lay down. Appellee and Draper took Mr. Norwood's clothes off and used them to hogtie him. Mr. Norwood said the pair could just take the money and leave, but appellee refused, ordering Draper to stand with Mr. Norwood while he ran back to the car. Appellee returned with a handful of tools including a socket wrench and a tire iron. Despite Draper's pleading with appellee to leave, appellee "started getting mad" and hit Mr. Norwood with a tire iron. Appellee then ordered Draper to hit Mr. Norwood with the socket wrench. *Id.* at 679-81. Together the pair beat Mr. Norwood until he appeared to be dead, pulled Mr. Norwood's body between two tombstones, and then took Mr. Norwood's car.[27] *Id.* at 682. That night, appellee returned to the cemetery by himself, soaked Mr. Norwood's body in gasoline and set it on fire. *Id.* at 688.

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27. Once they left the cemetery, the two men threw Mr.. Norwood's possessions into a metal trash can in a nearby Pathmark parking lot. The next day, they returned to the trash cans, and fished through them for credit cards or money. After finding Mr. Norwood's credit card and AT&T phone card, the pair went to Atlantic City with a man named Ronald Rucker to try to get money from the credit card. *Id.* at 689-90.

Appendix F

LEGAL ANALYSIS

Petitioner raises the following issues on appeal:

1. Was the lower court without jurisdiction to consider defendant's third PCRA petition where his timeliness exception claims[28] raised a claim known to him years before he filed the petition?

2. Whether the lower court erred in finding that the information allegedly suppressed by the Commonwealth was otherwise unavailable to defendant, would have been helpful to his case and admissible, and met the legal standard for "materiality."[29]

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28. This Court found as valid only one timeliness exception claim – governmental interference. The "claim" that was "raised" by the "timeliness exception claims," which the Commonwealth alleges was known to appellee "years before he filed the petition" is presumably the underlying *Brady* claim upon which this Court found appellee is entitled to relief under 42 Pa.C.S. § 9543(a)(2)(i). As discussed *infra*, appellee did not know of this *Brady* claim – based on withheld evidence of Norwood's sexually inappropriate behavior – "years before he filed the petition."

29. On October 3, 2012, appellant filed both a Notice of Appeal and a Statement of Errors Complained of on Appeal Pursuant to Pa.R.A.P. 1925(b) (Statement of Errors). On October 12, 2012, appellant applied for leave to amend its Statement of Errors and affixed an Amended Statement of Errors, which included the second issue addressed herein. The Court issued an Order on October 15, 2012, formally accepting appellant's Amended Statement of Errors.

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Appellee's timeliness exception claim of governmental interference, which this Court found was established and which accorded this Court jurisdiction, did not raise a claim known to appellee for years before he filed the instant petition; appellee actually learned of his claim – a claim of suppressed material evidence which this Court found met all the requirements under *Brady v. Maryland*, 373 U.S. 83 (1963) – during the evidentiary hearing which was ordered in this case.

This Court found that the Commonwealth suppressed multiple pieces of evidence, all of which shared a common feature: each strengthened the inference that Amos Norwood was sexually involved with boys around appellee's age at the time of his murder. The Commonwealth withheld one such statement entirely[30] and turned over to the defense two "sanitized" statements.[31] In those "sanitized"

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30. This was evidenced by Mrs. Foulkes' handwritten note found in the District Attorney's Office's Norwood trial file. Ms. Foulkes had a conversation in which she learned that Ronald House, a 16-year-old boy in Amos Norwood's church, was groped "on privates" by Mr. Norwood, and that there were other "possible incidents." N.T. 9/20/2012 (P.M.) at 120-23. (See Attachment D, marked as Exhibit Court-2 before this Court, page 2). For this Court's discussion of how Ms. Foulkes' pattern of selective non-disclosure amounted to "gamesmanship," see Appendix.

31. This was evidenced by a June 1984 police activity sheet. Mamie Norwood, Amos Norwood's widow, and Reverend Charles Poindexter, Amos Norwood's colleague at St. Luke's Church and friend for almost 30 years, both made statements to police about Mr. Norwood's homosexual involvement with teenage boys in his community. The police activity sheet revealed that Mrs. Norwood

told police about a time in which she awoke at 2 AM to find a "young male, slim," standing silently in the hallway of her home. Mrs. Norwood explained to police that her husband woke her to ask her for money. Mrs. Norwood told police that "at that point" she believed it to be a kidnapping. She watched as her husband loaded some stereo equipment into his car, and then he got in and drove off with the young man. Mrs. Norwood said that her husband returned home around 9-10 AM the next day and told her a "rambling" story about being "abducted," but that he was able to "escape" after using "psychology" on the captors "until they fell asleep." Mrs. Norwood remembered that he pleaded with her not to get the police involved. Additionally, Mrs. Norwood's eldest daughter was present during the interview, "but made no comment on her belief in the veracity of the story." (See Attachment E, marked as Exhibit P-24 before this Court, page 2). In the version of Mamie Norwood's statement that was disclosed to the defense, this entire account was omitted. (See Attachment F, marked as Exhibit C-2 before this Court, item 17). In fact, the only mention of Mr. Norwood driving young males in his car was Mrs. Norwood's statement: "[m]y husband would drive the kids home [from church] who didn't have a ride so a lot of people were in his car ; at times," and that "he would have to know the person very well to pick them up. He never picked up strangers." *Id.*

The same police activity sheet also revealed that Reverend Poindexter told police "in confidence" that Mr. Norwood "may have been a homosexual," and that he had "in fact received a complaint about five years ago from the mother of a 17 year old parishioner that deceased had propositioned the 17 year old for sex, (male)." (See Attachment E, marked as Exhibit P-24 before this Court, page 1). Additionally, the activity sheet noted that Reverend Poindexter "added that deceased had worked with juvenile males in the parish for years, doing counciling [sic] work for disturbed males, and males with family problems." *Id.* In the version of Reverend Poindexter's statement that was disclosed to the defense, all mention of homosexuality was removed. (See Attachment G, marked as Exhibit

statements, direct and indirect evidence of Mr. Norwood's ephebophilia[32] had been omitted, the government interfered with appellee's ability to present the claim that his due process right to a fair trial had been violated. This claim has not been waived, nor previously litigated, as it is based on information discovered in September 2012. The suppression of this evidence, which could have been used to develop *and* pursue an alternate theory at the penalty phase, undermines confidence in the jury's death sentence, thereby constituting a meritorious claim of a constitutional violation under *Brady v. Maryland*, 373 U.S. 83 (1963) and *Cone v. Bell*, 556 U.S. 449 (2009).[33]

C-2 before this Court, item 19). In response to the question by police, "Do you know of any problems Mr. Norwood had in the past?," the statement included an answer about how five years earlier, men "came to [Mr. Norwood's] house, and told his wife, they had him in the car and wanted money." *Id.*

32. "Ephebophilia" is the psychological term for the attraction of adults to adolescents. It derives from the root "ephebe," which means "a young man." Webster's New Encyclopedic Dictionary 610 (2002).

33. This Commonwealth has had the death penalty in effect since its reinstatement in 1978 and, as the law of this Commonwealth, this Court has followed it in presiding over more than a dozen capital cases and in imposing the jury's verdict of death in three of those cases. An integral part of the jurisprudence of the death penalty is that it is for the *jury* to decide whether the defendant and the case before them is more – or less – deserving of the death penalty. *See Commonwealth v. Blount*, 647 A.2d 199, 209 (Pa. 1993) (finding that the process of weighing aggravating and mitigating factors is the "exclusive function of the jury"). Inherent in this determination is that the jury be given the full picture of what the case was about, and

Appendix F

I. Jurisdiction

For this Court to have jurisdiction to grant appellee's PCRA petition, the petition must have been filed within one year of the date that the judgment became final, or appellee must prove one of the three timeliness exceptions delineated in 42 Pa.C.S. §§ 9545(b)(1)(i)-(iii). *See* 42 Pa.C.S. § 9545(b)(1). Given that the judgment against appellee became final decades ago, jurisdiction would not exist without appellee satisfying a timeliness exception. Additionally, the instant petition had to be filed within 60 days of the date that it could have first been presented. 42 Pa.C.S. § 9545(b)(2). Our Supreme Court has indicated that the 60-day rule requires appellee to "explain why, with the exercise of due diligence, the claim could not have been filed earlier." *Commonwealth v. Marshall*, 947 A.2d 714, 720 (Pa. 2008), *citing Commonwealth v. Breakiron*, 781 A.2d 94, 98 (Pa. 2001).

(1) 42 Pa.C.S. § 9545(b)(1)

In this case, the Court concluded that appellee satisfied the first timeliness exception, "governmental interference." "Although a *Brady* violation may fall within the governmental interference exception, the petitioner must plead and prove the failure to previously raise

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what may have prompted the defendant's unlawful actions – including behavior of the victim as it relates to the circumstances of the offense and of the defendant. By withholding from the jury the full picture in the instant case, the trial prosecutor elected to put herself in the role of controlling what the jury's verdict should be, thereby usurping the jury's unique role in the determination of the penalty.

the claim was the result of interference by government officials, and the information could not have been obtained earlier with the exercise of due diligence." *Commonwealth v. Abu-Jamal*, 941 A.2d 1263, 1268 (Pa. 2008), *citing Breakiron*, 781 A.2d at 98 (combining the requirements of § 9545(b)(1)(i) and § 9545(b)(2)). When a claim of governmental interference is rooted in the Commonwealth's failure to produce exculpatory evidence, appellee bears the burden to "identify a specific claim that he was unable to discover or develop due to the District Attorney's conduct." *Commonwealth v. Howard*, 788 A.2d 351, 355 (Pa. 2002), *citing Commonwealth v. Yarris*, 731 A.2d 581, 588 (Pa. 1999). In *Howard*, the petitioner could not demonstrate governmental interference because he failed to "explain how the District Attorney's conduct hobbled his development or prevented his discovery of any particular claim." *Howard*, 788 A.2d at 355. Likewise in *Commonwealth v. Stokes*, the petitioner was aware of potentially exculpatory information in files maintained by the United States Postal Service and the Philadelphia Police Department for years before he sought them, and he "never asserted that the prosecution (or anyone else) prevented him from gaining access to these files in the 12 years between the date his direct appeal was decided and the date he ultimately sought the files." 959 A.2d 306, 310 (Pa. 2008). Accordingly, Stokes' governmental interference claim was fatally flawed. *Id.* at 311.

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In the instant matter, this Court found that appellee met its burden of identifying a specific claim he was unable to discover or develop due to the government's conduct. This Court found that the government interfered with appellee's presentation of a claim under *Brady* in two ways. First, the act of removing pertinent information from a statement, and providing a "sanitized" version, which purports to be the entirety of the statement, is interference in and of itself. The government's sanitization of Mamie Norwood's and Reverend Charles Poindexter's statements, and flat non-disclosure of information about Amos Norwood's sexual advances on Ronald House, interfered with appellee and his attorney learning that Mr. Norwood had engaged in sexually inappropriate behavior with teenage boys other than appellee. By scrubbing these statements of references to Mr. Norwood's sexual improprieties and then providing the "clean" versions, the government created the false impression that appellee was given the full account of what these witnesses stated. That false impression "hobbled" appellee's ability to "discover or develop" a *Brady* claim rooted in information removed from the scrubbed statements. That false impression was maintained by the Commonwealth until the original statements were found – in the government's files and some in the very handwriting of the trial prosecutor.

Second, throughout the litigation of this case, the government has disputed the existence of information in their files about Amos Norwood's homosexual ephebophilia, thus further interfering with appellee learning the facts that form the basis of the instant *Brady* claim. In *Stokes*, our Supreme Court affirmed the PCRA Court's determination that there had been

no governmental interference, as the petitioner was aware of the existence of information in the files of the United States Postal Service and the Philadelphia Police Department for years. *Stokes*, 959 A.2d at 310. In fact, the trial prosecutor in that case maintained an "open file" policy, which highlighted how the *government* had given the petitioner access to relevant information. *Id.* at 311. The government's behavior in this case is notably different. Here, the government has continually denied the existence of exculpatory evidence.

At the 1998 evidentiary hearing regarding appellee's 1995 PCRA petition, the government intervened as appellee attempted to put forth evidence that Amos Norwood had been sexually abusive towards young boys, including appellee. When appellee proffered that evidence, Judge Savitt looked to the Commonwealth for clarification, asking directly: "there is nothing in the case involving Norwood's homosexuality or violation of young boys[?]" N.T. 4/8/1998 at 237. The Commonwealth responded to Judge Savitt's question, "Oh, no, just that he knew about Norwood's behavior and was trying to extort

money[34] from it."[35] *Id.* Precisely the evidence that Judge Savitt asked for was sitting in the government's files.

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34. The "extortion" plot referenced by the Commonwealth in response to Judge Savitt's question is different from the evidence that the government suppressed. In his July 20, 1984 statement to police and again at trial in the Norwood case, Draper said that appellee suggested that the two men "extort" Mr. Norwood by telling his wife that he was gay. See Attachment O, which was marked as Exhibit P-2 in the PCRA hearing before this Court; N.T. 1/22/1986 at 667-68. Ms. Foulkes referenced this in her opening statement. N.T. 1/14/1986 at 44. Draper's testimony that appellee said he might exploit his knowledge of Mr. Norwood's sexual *orientation* is critically different from evidence that Mr. Norwood molested and/or attempted to molest teenage boys.

35. The record of this discussion reflects that Judge Savitt and ADA, Silverstein were talking at the same time towards the tail end of Judge Savitt's question about Norwood's violation of young boys.

> THE COURT: But there is nothing in the case involving Norwood's homosexuality or violation of young boys –
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> ADA SILVERSTEIN: Well, that was the secret.
>
> THE COURT: – that accrued that was involved.
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> ADA SILVERSTEIN: Oh, no, just that he knew about Norwood's behavior and was trying to extort money from it. It didn't work so it moved on to robbery and murder, so it was not a secret. It was not a secret to anyone at that time.

N.T. 4/8/1998 at 235–37.

The only reasonable way to read the back-and-forth is that when ADA Silverstein responded, "Oh no, just that he knew about Norwood's behavior and was trying to extort money from it," that he was responding to Judge Savitt's question.

Without that evidence, the Court forcefully attacked the relevance of testimony proffered by the defense as to any potential sexual impropriety in Norwood's past. Based on the Commonwealth's affirmative misrepresentation[36] that there was nothing else in the case involving Norwood's "homosexuality or violation of young boys," Judge Savitt prevented both lay witnesses and expert witnesses from developing that issue. *Id.* at 158-59, 181-82; N.T. 4/9/1998 at 360-61; N.T. 4/13/1998 at 597-605.

There is nothing in the text of § 9545(b)(1)(i) requiring that the Commonwealth *maliciously* interfere in the presentation of a claim. Our Supreme Court has long held that the statutory language of the PCRA must be "strictly adhered to." *Commonwealth v. Pursell*, 724 A.2d 293, 303 (Pa. 1999). The plain language of § 9545(b)(1) requires only that "the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution." Therefore, the PCRA prosecutor's state of mind when representing to the Court that there was

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36. As discussed *infra*, the trial prosecutor is charged with a duty to "learn of" what exculpatory evidence is in the police files. *Kyles*, 514 U.S. at 437; *Gibson*, 951 A.2d at 1127; *Burke*, 781 A.2d at 1142 n.5. The PCRA prosecutor was specifically questioned by the Court as to whether exculpatory evidence was in "the case." As per the dictates of *Kyles* and its progeny, "the case" encompasses both the District Attorney's Office and police files. The prosecutor's manner of response implied that he had gone through all pertinent files in the case and found nothing. In fact, the information that he stated did not exist was in the government's files and obviously had not been turned over.

nothing in this case about the victim's violation of young boys is not dispositive. Based on the statement of the Commonwealth, Judge Savitt stated that he would "not consider [Mr. Norwood's desire to have sex with kids] as a fact unless on the – on this bare assertion. Now, you should understand that. There would have to be evidence of it and, in other words, what was seen, when it was seen, who was present, who was involved."[37] N.T. 4/13/1998 at 602. Having removed such evidence from the case prior to trial, the government's continuing assertion that no such evidence existed amounted to continuing governmental interference from the time of trial until the government's files were ordered to be opened in September 2012.[38]

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37. This Court does not disagree that bare assertions are insufficient. However, the evidence uncovered in the government's files possesses the necessary degree of specificity.

38. As there is – and was – a close working relationship between the District Attorney's Office's Homicide Unit and the Philadelphia Police Department Homicide Unit, the Assistant District Attorneys assigned to this case could have reviewed the contents of the Police Department's files at any time. Yet as late as the September 14, 2012 hearing before this Court, ADA Ronald Eisenberg himself made a statement which was not entirely true about the scope of the evidence: "[Y]es, there was one piece of a homosexual element to the case. The defendant said he could extort money from Norwood by threatening to reveal that he was gay. That's what he [Draper] said starting from the first time he ever spoke to police about this case." N.T. 9/14/2012 at 57. In addition to the note about Ronald House's sexual abuse as discussed *supra*, there were in fact multiple handwritten notes by Ms. Foulkes referencing homosexuality. On a note titled "*Ask Marc*," Ms. Foulkes wrote, "What motivates Terry? Money, self, betrayal, homosex." (See Attachment H, which was marked as P-5 in the PCRA hearing before this Court). In a note found in the Hamilton trial box

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(2) 42 Pa.C.S. § 9545(b)(2)

In its Statement of Errors, the Commonwealth argues that appellee's "timeliness exception claims raised a claim known to him years before he filed the petition." In order to answer the Commonwealth's claim of error, this Court must identify when appellee's timeliness exception claim became known to him. Appellee could not have known that the government interfered with the presentation of evidence about Amos Norwood's homosexual ephebophilia until such evidence was uncovered. It became clear for the first time in September 2012 that the Commonwealth made incomplete disclosures to defense counsel at the time of trial, and that the government's representations to the 1998 PCRA Court were, in fact, misrepresentations.[39]

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titled "prep – M. Draper 12-20-84 PAB," Ms. Foulkes wrote "knew that Terry made $ by going to bed w/men." (See Attachment I, which was marked as P-8 in the PCRA hearing before this Court). And on another note titled "*Marc Draper* 12-27-85," Ms. Foulkes jotted down the sequence of events from the Norwood killing, and included the following details: "did he [Mr. Norwood] know Terry – liked boys." On the next page, Ms. Foulkes wrote, "did he like boys," and below that "how long had he known Terry." (See Attachment J, which was marked as P-9 in the PCRA hearing before this Court). Lastly, on another note Ms. Foulkes made a more general, though cryptic, reference about the state of the case: "continued investig for faggot squad." N.T. 9/20/2012 (A.M.) at 37-40.

39. The United States Supreme Court's opinion in *Banks v. Dretke*, 540 U.S. 668, 698 (2004) offered persuasive guidance to this Court about the impact of government misrepresentations regarding the existence of evidence on whether a defendant can fairly be considered not diligent for pursuing such evidence.

> In summary, Banks's prosecutors represented at trial and in state postconviction proceedings that

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Within 60 days of the date that the instant *Brady* claim first could have been presented, appellee flied his September 28, 2012 amendment to his PCRA petition, wherein he explained "why, with the exercise of due diligence, the claim could not have been filed earlier," thereby satisfying the second "jurisdictional" requirement. 42 Pa.C.S. § 9545(b)(2); *Marshall*, 947 A.2d at 720, *citing Breakiron*, 781 A.2d at 98.

For a court to have jurisdiction over a PCRA petition filed more than one year after the date the judgment became final, both § 9545(b)(1) and § 9545(b)(2) mandate that the petitioner explain the delay in raising "the claim."[40] In a *Brady* case, this claim-centric perspective means that appellee must set forth "when and how he discovered the Brady material that the Commonwealth allegedly withheld from him." *Breakiron*, 781 A.2d at 98. Likewise, in *Commonwealth v. Hawkins*, our Supreme Court analyzed the jurisdictional requirements of § 9545 in the context of a *Brady* claim by asking when "the facts

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the State had held nothing back. Moreover, in state postconviction court, the State's pleading denied that Farr was an informant. It was not incumbent on Banks to prove these representations false; rather, Banks was entitled to treat the prosecutors' submissions as truthful. Accordingly, Banks has shown cause for failing to present evidence in state court capable of substantiating his Farr *Brady* claim.

40. 42 Pa.C.S. § 9545(b)(1)(i) requires that "the failure to raise the claim was the result of interference by government officials ...." (Emphasis added). 42 Pa.C.S. § 9545(b)(2) requires that "[a]ny petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented." (Emphasis added).

upon which [the appellant's] *Brady* claim is based were first revealed," and whether "due diligence would not have revealed them before that time." 953 A.2d 1248, 1253 (Pa. 2008).

In the instant matter, the facts substantiating appellee's *Brady* claim were first discovered in September 2012. Appellee's due diligence would not have revealed that prior to the PCRA hearing before this Court.[41] Based in part on Draper's January 9, 2012 declaration that he had

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41. Appellee's September 6, 2012 discovery request for exculpatory information about Norwood's sexual relationships with children under the age of 18 was based on statements made by Reverend Charles Poindexter and Ronald House to appellee's counsel in early 2012. *Appendix to Petition for Post-Conviction Relief*, 7/16/2012, items 10 and 11 respectively. At that time, Reverend Poindexter stated that Norwood "seemed to have lots of close relationships with young men, most of whom I didn't know. We began to suspect that Amos was having inappropriate relationships with young men." *Id.* at item 10, paragraph 6. Reverend Poindexter also stated that "the mother of a 15-year old boy" told him "that while Amos was driving her son home from a youth group event, Amos touch [sic] her son's genitals. She also told me that Amos had inappropriately touched a number of other boys at the church." *Id.* at item 10, paragraph 15. Reverend Poindexter identified Ronald House as a victim of Norwood's sexual advances. *Affidavits of Jennifer Givens and Eric Montroy*, 9/27/2012 at 2 (See Attachment K). On the basis of that statement of Reverend Poindexter, appellee's attorneys interviewed Mr. House, who said that Mr. Norwood propositioned him for sex when he was 17, and had done the same thing to a friend of his named Bernard. *Appendix to Petition for Post-Conviction Relief*, 7/16/2012, item 11, paragraphs 4-6.

Appellee's attorneys went to speak with Reverend Poindexter on January 12-13, 2012 after having spoken with Draper on January 9, 2012. On that date, Draper stated that he had told detectives during trial prep sessions that:

> Norwood was a homosexual and that he was in a relationship with Terry and that that is what this case was really about. They did not want to hear that. They wanted the motive to be a robbery and kept coming back to that. That's how they wanted me to testify, that it was a robbery.

Declaration of Marc Draper, 1/9/2012 at 4. (See Attachment A, which is pages 11-17 of Exhibit P-16 in the PCRA hearing before this Court).

After Draper "disclosed for the first time the information stated in paragraphs 4 [quoted above} and 7," appellee's attorneys "looked into potential witnesses who might know something confirming the new disclosures by Mr. Draper." *Affidavits of Jennifer Givens and Eric Montroy*, 9/27/2012 at 2 (See Attachment K).

> We reviewed the 6/22/84 police report (with a statement from Reverend Poindexter) provided by the Commonwealth in discovery to Mr. Panarella, which included this comment from Reverend Poindexter: "Several years ago, within the last 5 years, he [Mr. Norwood] was abducted and the men came to the house, and told his wife they had him in the car and wanted money."

Id.

Draper's January 9, 2012 declaration cast Reverend Poindexter's June 22, 1984 statement in an entirely new light. Draper's allegations that the police pushed him to re-shape a story about a sexual relationship gone wrong and to call it a "robbery" would lead a diligent attorney to take a second look at any other possible instances in which witnesses had told police about prior "robberies" involving Amos Norwood. The reference to Norwood's prior robbery in the disclosed version of Reverend Poindexter's June 22, 1984 statement sounds bizarre at first blush. But when viewed

been pressured to testify that appellee's motive for the crime was to rob the victim, and not to go into detail about their homosexual relationship, appellee filed the instant PCRA petition on March 9, 2012. This Court found that appellee's claim had arguable merit and, if sufficiently proved at an evidentiary hearing, potentially satisfied the requirements of § 9545(b)(2).[42] At the evidentiary hearing,

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through the lens of Draper's January 9, 2012 declaration – that "robbery" was the brush used to sweep homosexual impropriety under the rug – Reverend Poindexter's statement called for follow-up. And though that follow-up led to Reverend Poindexter saying there was much more to Amos Norwood and led to Ronald House detailing his experience with Mr. Norwood, it did not lead to knowledge that the government had had this information all along. That only came about after this Court ordered the District Attorney's and Police Department's files opened.

And, as it turned out, it was shown that the government had removed references to Mr. Norwood's homosexual ephebophilia from Reverend Poindexter's statement, and from Mamie Norwood's, thereby making it seem that Mr. Norwood was just a kind church volunteer who had been the victim of a – bizarre robbery years earlier.

42. In *Morris II*, our Supreme Court noted that, when deciding whether a stay of execution is appropriate, jurisdictional questions "should be well fleshed out in advance and we believe that issues related to timeliness should be relatively easy to dispose of by the time they reach this court." *Commonwealth v. Morris*, 822 A.2d 684, 692 (Pa. 2003) ("Morris II") (emphasis added). In *Morris II*, the appellant asserted that he was entitled to an evidentiary hearing regarding witness compensation for testimony as part of a claim of governmental interference. Our Supreme Court rejected the appellant's claim because it was "speculative ... in the absence of any allegations tying the witnesses in a particular case to the District

appellee discovered exculpatory evidence that had been in the government's files since the time of trial and had never before been turned over to the defense. After the hearing, appellee requested leave to amend his March 9, 2012 PCRA petition to include a more nuanced *Brady* claim focused on the evidence uncovered. N.T. 9/25/2012 at 51. That request was granted, and on September 28, 2012, appellee flied an Amendment and Supplement to Petition for Post-Conviction Relief. Therein, appellee argued that he was entitled to relief based on information that came to light for the first time in September 2012 – namely that the government withheld multiple statements from trial counsel, all of which strengthened the inference that Amos Norwood was sexually inappropriate with a number of teenage boys in his community.

This latter claim could not have been filed earlier with the exercise of due diligence because appellee was unable to gain access to the government's trial files until this Court granted an evidentiary hearing on September 14, 2012. In fact, appellee was duly diligent in pursuing this evidence. Appellee attempted to elicit testimony at the 1998 PCRA hearing about the victim's homosexual ephebophilia

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Attorney's policy of paying for their services." *Id.* at 699. Unlike the situation in *Morris II*, appellee's governmental interference claim as set forth in his March 9, 2012 petition and July 27, 2012 Amended Petition was based on averments which, if believed, would have constituted a sufficient basis upon which jurisdiction could have been rooted. This Court found that Appellee's claim regarding the government's undue pressure on Draper created a "material issue of fact," and thus required an evidentiary hearing pursuant to Pa.R.Crim.P. 908(A)(2).

through fact witnesses James Villareal and Donald Fisher. N.T. 4/8/1998 at 229; N.T. 4/13/1998 at 597-605. However, appellee was stifled in his presentation of that evidence by the Commonwealth's steadfast representation that there was no such evidence, and Judge Savitt's consequent limitation on the 1998 PCRA proceedings. From the time that Judge Savitt denied relief until the Third Circuit denied appellee's habeas corpus claims, the litigation had lasted for approximately 16 years. By the time the Third Circuit ruled, appellee had almost no avenue left and execution became a real possibility.

Nevertheless, the defense was still actively involved in its representation of appellee. The defense prepared a petition for a writ of *certiorari*, which it filed in the United States Supreme Court on December 13, 2011. While awaiting a decision from that Court, appellee's counsel approached Draper to see if the possibility of appellee's potential nearing execution would finally prompt him to speak with them.

Dating back to the time of trial, Draper had refused to speak with appellee's attorneys.[43] Appellee's attorneys again tried to speak with Draper on an occasion when he was at SCI-Graterford, which was from 1995-2006. N.T. 9/24/2012 (A.M.) at 35. Draper testified that he did not speak with appellee's representatives because, "I didn't want to speak on anything to anybody." N.T. 9/20/2012 (P.M.) at 210. Draper cited fear that the police would still charge him with the murder of Donna Friedman, as well

43. Mr. Panarella testified at the post-trial motions hearing, "Mr. Draper would not discuss the case with my associate." N.T. 4/24/1987 at 7.

as feelings of anger at himself as reasons for his self-imposed silence. *Id.* at 208; 211. This Court found Draper's explanations for having refused to communicate credible and therefore accepted them.

Thus, when appellee's attorneys visited Draper at SCI-Frackville in January 2012 as a "last ditch attempt," and told him that appellee was "about to be put to death," Draper decided to break his silence. *Id.* at 215. While testifying before this Court, Draper broke down crying, stating that "nobody wants to know that you a transformed person [sic]. Nobody wants to know that what type of person you are now from when you was 18 [sic]. I'm 46 now." *Id.* at 216. This Court found credible Draper's reasoning for finally speaking up. It made sense. He talked about how maturity and his "relationship with the Lord" motivated him to speak because "if I call myself a Christian, right, and I live by faith, not by sight, and God loved me so much, then, you know, he blessed me so much that, you know, I have to share that blessing and I wouldn't want to see anybody put to death." *Id.*

"Diligence" is defined as "[a] continual effort to accomplish something"; "care; caution; the attention and care required from a person in a given situation."[44] *Black's Law Dictionary* (9th ed., 2009) ("diligence"). Considering appellee's "situation" as part of the "due diligence" calculation, this Court found it significant that there were a number of instances in which Draper rebuffed

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44. *Black's Law Dictionary* defines "due diligence" by referring to its entry for "diligence." *Black's Law Dictionary*, (9th ed., 2009) ("due diligence").

appellee's attorneys when they had sought to speak with him.[45] Additionally, even after the Third Circuit denied his habeas corpus petition in March 2011, appellee's counsel were busy pursuing relief on his ineffective assistance of counsel claim with the United States Supreme Court. Instead of waiting for the High Court to grant or deny *certiorari*, or for Governor Corbett to sign his execution warrant, appellee took action reasonably quickly after March 2011, to ensure that no stone had been left unturned.

As a result of Draper's two declarations, appellee filed the March 9, 2012 PCRA petition, which led to this Court's decision to grant an evidentiary hearing, to the discovery of the exculpatory documents, and thus ultimately to the underlying substantive *Brady* claim.

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45. In the context of Pa.R.Crim.P. 600 – the speedy trial rule – our courts have emphasized that due diligence must be determined on a case-by-case basis. "Due diligence does not require perfect vigilance and punctilious care, but rather a showing by the Commonwealth that a **reasonable effort** has been put forth." *Commonwealth v. Hill*, 736 A.2d 578, 588 (Pa. 1999) (emphasis added). A "punctilious care" standard would require that an individual renew efforts having been rebuffed multiple times. However, a "reasonable effort" standard allows for reliance on a representation that the evidence sought cannot be obtained.

This claim satisfies the 60-day provision of § 9545(b)(2), as it was formally flied from three to six days after the first date on which it could have been presented.[46] The evidence substantiating the current claim comes from the District Attorney's Office's flies and the Philadelphia Police Department's flies, which were opened on September 22, 2012 and September 25, 2012, respectively. Appellee then filed the Amendment and Supplement to his PCRA petition on September 28, 2012. Accordingly, this Court found that it had jurisdiction under §§ 9545(b)(1) and (2).

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46. The Commonwealth argued that appellee should not be permitted to amend his PCRA petition to conform to the evidence produced at the evidentiary hearing because the documents uncovered during the evidentiary hearing did not constitute a meritorious *Brady* claim. N.T. 9/25/2012 at 61. This Court was cognizant of the significant interests that the Commonwealth had, and continues to have in this case as regards finality. These are also strong interests in the justice system as a whole and were noted by our Supreme Court in *Morris II*, as noted in FN 42, *supra*. However, on balance, this Court found that appellee was entitled to amend pursuant to Pa.R.Crim.P. 905(a). Appellee's request to amend his petition, which was granted and constituted the basis for appellee's subsequent "Amendment and Supplement," distinguishes the procedural posture of this case from *Commonwealth v. Porter*, 35 A.3d 4 (Pa. 2012).

Appendix F

II. Not Previously Litigated; Not Waived

Appellee's claim is not "waived" under § 9544(b). A claim of error is waived if a party could have raised the issue at trial, on appeal, or in a prior post conviction proceeding but failed to do so. *Commonwealth v. Peterkin*, 649 A.2d 121, 124 (Pa. 1994). There was no prior proceeding in which appellee could have raised the claim that the government suppressed evidence that Draper had been pressured to call the crime a robbery-gone-wrong, or the claim that the government suppressed evidence of the victim's homosexual ephebophilia, as the latter evidence was uncovered in September 2012.

Nor is appellee's claim "previously litigated" under § 9544(a). A claim of error is "previously litigated" when either the "highest appellate court in which the appellee could have had review as a matter of right has ruled on the merits of the issue," or "it has been raised and decided in a proceeding collaterally attacking the conviction or sentence." 42 Pa.C.S. §§ 9544(a)(2), (3). None of the claims raised by appellee in his 1995 PCRA petition was based on the prosecution having suppressed Draper's statement to the government or evidence of the victim's homosexual proclivities towards teenage boys. Not until appellee amended his March 9, 2012 PCRA petition in light of the September 2012 evidentiary hearing has he raised the specific claim upon which relief was granted. Additionally, it would be impossible for a court to have ruled on the merits of appellee's current *Brady* claim, given that the evidence found in the government's files was uncovered in September 2012. The "merits" of the current issue revolve

around whether or not the three prongs of *Brady* have been met, whereas the "merits" of the issues discussed in appellee's prior PCRA petition revolved around whether or not trial counsel was constitutionally ineffective.

Additionally, the nondisclosure of evidence- and the affirmative misrepresentation by the Commonwealth that such evidence did not exist, as noted *supra*- ensured that the issues about Amos Norwood's homosexual impropriety with boys was not "previously litigated."

III. Success on the Merits

Appellee demonstrated that the government "sanitized" the statements of two witnesses, Mamie Norwood and Reverend Charles Poindexter, removing information that either directly or indirectly demonstrated that the victim was a homosexual ephebophile. N.T. 9/25/2012 at 10-20; 39-40. Additionally, the prosecutor failed to disclose to defense counsel evidence in her possession, as well as in the Philadelphia Police Department's file, that the victim had made sexual advances on a teenage member of his church, and that there were other possible instances of sexual impropriety. N.T. 9/20/2012 (P.M.) at 121-24. With the suppressed evidence in hand, reasonable trial counsel could have pursued an alternate theory at the penalty phase, rooted in evidence that would have been admissible during the guilt phase and bolstered during the penalty phase of trial. At the guilt phase, both Mamie Norwood and Reverend Poindexter testified that Amos Norwood was a kind church volunteer who spent his time helping underprivileged children. N.T. 1/14/1986 at 157-58; 166-

67; 172-74. The information that each had previously provided to the government could have been used on cross-examination to directly contradict *their* characterizations of Mr. Norwood. And, at the penalty phase, a reasonable defense attorney could have called a witness like Ronald House to testify about his experience as a sexual target of Amos Norwood. Based on that evidence, reasonable trial counsel could have credibly argued that appellee was another one of Mr. Norwood's teenage sexual targets, ultimately bolstering appellee's case in mitigation and undermining confidence in the jury's death sentence. Without this evidence, appellee's counsel was given a skewed and incomplete picture of the victim which effectively tied his hands while the prosecution elicited testimony at trial about his kind and caring character, and then argued to the jury at the penalty phase that the victim's "kind" and "innocent" nature should be considered against appellee when determining whether to sentence him to death. This Court concluded that, if disclosed, the cumulative impact of this evidence would have enabled reasonable trial counsel to challenge, if not entirely to preclude, the government's sympathetic portrayal of the victim, while also explaining how Norwood's sexual advances amounted to a mitigating "circumstance of the offense" under 42 Pa.C.S. § 9711 (e)(8).

Preliminarily, it is important to note that for evidence to qualify as *Brady* material, it must "involve the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *U.S. v. Agurs*, 427 U.S. 97, 103 (1976). Prosecutors do not have to disclose apparently exculpatory evidence "where

the parties had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence." *Commonwealth v. Morris*, 822 A.2d 684, 696 (Pa. 2003), *citing Commonwealth v. Paddy*, 800 A.2d 294, 305 (Pa. 2002). The "defense diligence" requirement of *Brady* has been addressed numerous times by the courts of our Commonwealth. *See, e.g., Pursell*, 724 A.2d at 305; *Paddy*, 800 A.2d at 305; *Commonwealth v. Johnson*, 863 A.2d 423, 426 (Pa. 2004); *Commonwealth v. Crews*, 863 A.2d 498, 502 (Pa. 2004). Throughout these cases, our Supreme Court has limited the prosecutor's duty under *Brady*, finding that prosecutors need not disclose "evidence" or "information" in the government's possession that the defendant knew or could have known. *See, e.g., Johnson*, 863 A.2d at 426 ("No Brady violation where the Appellant knew or could have uncovered the evidence at issue with reasonable diligence."). But that limitation is itself limited; when determining whether the defendant knew or could have known of the suppressed evidence, our courts focus on the *specific evidence* that the defendant claims has been suppressed, not on how that evidence would have been used at trial. When that evidence is either known or knowable to the defense, there is no *Brady* violation. *Paddy*, 800 A.2d at 305.

In *Johnson*, the defendant claimed that an affidavit written and signed by George Robles, a Commonwealth witness, was suppressed. The defendant argued that, as a result, impeachment evidence about Robles being a drug dealer who colluded with police was withheld. *Johnson*, 863 A.2d at 425. The defendant highlighted six aspects of Robles's affidavit as constituting *Brady* material. Our

Supreme Court's response was narrowly tailored to each aspect of Robles's affidavit, and whether or not the defendant knew of that specific information at the time of trial. *Id.* at 426-27. Because the Court determined that the defendant either was aware, or could have become aware with reasonable due diligence, of the individual pieces of evidence/information, the *Brady* claim failed.

In *Paddy*, the defendant argued that, as part of an unrelated murder, police were investigating a suspect who had been described in the same unique way as the suspect in the case for which Paddy was charged with murder. Paddy argued that information should have been disclosed prior to trial. *Paddy*, 800 A.2d at 304. Our Supreme Court held that "the information allegedly withheld from the defense was published in Philadelphia's two major newspapers, the Philadelphia Inquirer and the Philadelphia Daily News, months before Paddy's second trial." *Id.* at 305. The fact that the evidence of this investigation was publicly available meant that it could not form the foundation of a *Brady* claim.

In *Crews*, the defendant claimed that the government withheld information about his own military records and his family background, history of mental illness and substance abuse. Our Supreme Court again focused on the precise evidence that the defendant claimed should have been turned over. "There is no nothing which demonstrates appellant could not have supplied his family background information and military records himself ... [N]one of the information he cites was uniquely within the control of the prosecution." *Crews*, 863 A.2d at 502.

But where the suppressed evidence is unknown, even if it is part of a larger "theory" that includes evidence that *is* known to the defense, there may still be a *Brady* violation when the government suppresses that unknown evidence. *Kyles*, 514 U.S. at 429, 447-48. In *Kyles*, the defendant knew that the key Commonwealth witness, Beanie, planted incriminating evidence in his garbage. *Id.* at 429. Nevertheless, the United States Supreme Court held that an internal police memorandum calling for the seizure of Kyles' garbage based upon Beanie's suggestion was *Brady* material. *Id.* at 447-48. In other words, there was an additional "aspect" or "layer" to the evidence, about which the defendant did not know. Because that additional component to the evidence would have helped to round out a "theory" favorable to the defendant, the Supreme Court found that it was one piece of suppressed evidence which, along with others, cumulatively undermined confidence in the outcome at trial. *Id.* at 448.

In *Cone*, the Supreme Court held that evidence crediting and corroborating a defense theory could be the additional "aspect" or "layer" to the evidence about which the defendant did not know, and which the government had suppressed. *Cone*, 556 U.S. at 470-71. Mr. Cone knew that he was under the influence of drugs and alcohol when he went on a crime spree. *Id.* at 474. However, he did not know that witnesses who had seen him several days before and after the murders described him to the police as "wild eyed" and that his behavior was "real weird." *Id.* at 459. The United States Supreme Court found that the suppressed statements "strengthen[ing] the inference" that Cone was impaired at the time of the crime could

have amounted to a viable *Brady* claim so long as it was ultimately considered "material."[47] *Id.* at 475.

The Third Circuit recently applied that logic of *Kyles* and *Cone* in *Simmons v. Beard*, holding that, where suppressed evidence constitutes a crucial part of a larger "theory," the non-disclosure of *that* evidence can constitute a viable *Brady* claim. *See Simmons v. Beard*, 590 F.3d 223, 238 (3d Cir. 2009) ("Without the evidence suppressed by the prosecution, however, the defense could not credibly proffer such a theory. Had this information been available to the defense before trial, it could have much more effectively attacked the Commonwealth's case ..."). Our Supreme Court also recently endorsed the principle that suppressed evidence comprising part of a defense theory – whether that theory has been pursued *or* could *potentially* have been pursued – can substantiate a *Brady* claim, as long as that evidence is ultimately "material." *Commonwealth v. Ly*, 980 A.2d 61, 75 (Pa. 2009) ([T]he protection of *Brady* extends to the defendant's ability to investigate alternate defense theories and to formulate trial strategy.").

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47. The case was before the United States Supreme Court on a petition for a federal writ of habeas corpus after Mr. Cone had filed two unsuccessful state petitions for post-conviction relief. *Cone*, 556 U.S. at 461. The issue before the Supreme Court was whether a federal habeas claim is "procedurally defaulted" when it is twice presented to the state courts. After determining that the State's procedural objections "provide no obstacle to judicial review," the Court turned to the merits of the *Brady* claim. *Id.* at 469. Ultimately, the Court remanded the case to the District Court "with instructions to give full consideration to the merits of Cone's *Brady* claim." *Id.* at 476.

Appendix F

In *Ly*, three men who identified themselves as "gangsters" demanded that a restaurant owner in Philadelphia's Chinatown pay "protection money." *Id.* at 66. Soon after corralling three restaurant employees in the kitchen, one worker – Janice Wong (Janice) escaped out of a side door. The three gangsters ran after her, and eventually the person she called "Second Man" grabbed her arm and turned her to face him in a well-lit street corner. *Id.* The three men returned Janice to the restaurant, where they found Jade Wong (Jade) on the phone with police. After taking several steps toward the dining area, Janice heard a gunshot, saw Jade bleeding from her head, and then saw Second Man backing out of the side door in the area she believed the shooter would have been. *Id.* Shortly after the murder, Janice identified Ah Thank Lee as the person she had labeled "First Man." Nearly two years later, on the same day that Janice identified Cam Ly (the appellant) as Second Man, she identified Wong Kin Fung, not Ah Thank Lee, as First Man. *Id.* at 66-67. The Commonwealth failed to disclose to Mr. Ly that Janice had made an inconsistent identification with respect to First Man. Our Supreme Court held that the government "improperly withheld" the conflicting identification because it could have substantiated an alternate defense theory for Mr. Ly: "it could have been used to question Janice Wong's identification of Appellant as the shooter, especially given the prosecution's attempt to bolster Janice Wong's identification of Appellant with her identification of Ah Thank Lee." *Id.* at 78. The *Ly* Court ultimately concluded that the non-disclosure of Janice's conflicting identifications of First Man did not prejudice Mr. Ly because the other evidence against him was quite

strong; she had seen him in a well-lit street corner and never wavered in her identification of him. *Id.* Under *Ly*, evidence substantiating an "alternate defense theory" may properly be considered the foundation of a *Brady* claim, so long as that withheld evidence is "material."[48]

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48. In *Commonwealth v. Willis*, 46 A.3d 648 (Pa. 2012), Madame Justice Todd's Opinion Announcing the Judgment of the Court ("OAJC") discussed the principle in *Ly* that "Brady applies not only to purely exculpatory evidence or to evidence which relates to the credibility of witnesses, but also to evidence which impacts a defendant's ability to investigate alternate defense theories and to formulate trial strategy," and stated that it extends to cover both admissible and inadmissible evidence. *Id.* at 669-70, *citing Ly*, 980 A.2d at 76. To support the notion that *Brady* applies to inadmissible evidence, Madame Justice Todd cited to *Commonwealth v. Green*, 640 A.2d 1242 (Pa. 1994). Mr. Chief Justice Castille wrote a forceful concurring opinion, disagreeing with the OAJC's reliance on *Green*, instead arguing *Green* was wrongly decided, as it was based entirely on speculation:

> Here is the Green Court's dispositive analysis: "knowledge of [the undisclosed, inadmissible evidence] certainly would have opened another avenue of investigation for the defense that may well have led to further exculpatory evidence. Had the defense been aware of Moser's statements, it may also have altered its trial strategy, especially in regards to appellant's decision not to testify ...." There are no specifics in these "may haves." It is simply speculation upon speculation. No specific evidence is identified.

Willis, 46 A.3d 683 (Castille, C.J., concurring).

The Chief Justice then suggested that instead of allowing *Brady* material to include that which has a "possible effect[] upon 'defense preparation," he "would require that the derivative, admissible

Appendix F

Whereas *Johnson*, *Paddy* and *Crews* all involved information that was known/knowable to the defense, the precise information that the Commonwealth suppressed in the instant case was beyond the scope of appellee's knowledge. The evidence that the Commonwealth withheld was that Amos Norwood had engaged, or may have engaged, in inappropriate sexual behavior with other teenage boys in the past. Appellee obviously would have known about prior sexual encounters that *he* had had with Mr. Norwood.[49] But evidence that Mr. Norwood touched

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evidence be specifically identified with an explanation of why it is difference-making under the reasonable probability standard." *Id.* at 684.

As will be discussed in greater detail in the materiality section *infra*, the withheld evidence in the instant case is distinguishable from that which was suppressed in *Willis*. Unlike the suppressed statement in *Willis*, which was made by a co-defendant who would have pled the Fifth Amendment instead of testifying, rendering his prior out-of-court statement inadmissible hearsay, the statements crediting and corroborating appellee's account of inappropriate sexual activity with the victim would have been the backbone of an "alternate" defense theory, and *also* would have been admissible at trial. Therefore, it is possible to calculate the impact that such evidence would have had at the guilt and penalty phases of trial. Whereas in *Ly*, the impact of evidence supporting an alternate defense theory would not have been "material," this Court found that the evidence withheld in the instant case satisfied the prejudice inquiry because it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the [jury] verdict" of death. *Kyles*, 514 U.S. at 435.

49. Two pieces of evidence from trial suggest that appellee told Ronald Rucker and Draper something about a prior sexual encounter that he had had with Mr. Norwood. In Mr. Rucker's July

Ronald House's genitals, that Reverend Poindexter had received at least one complaint about a specific instance in which Mr. Norwood was sexually inappropriate with a teenage male, and that Mr. Norwood's wife awoke in the middle of the night as her husband left the house with a "young male, slim" and later related a bizarre story to her, was undoubtedly beyond the scope of appellee's conceivable knowledge.

18, 1984 statement to police, he noted that, "Terry said Amos was a homosexual and was the type to pay people." Two days later, Draper told police that, while appellee was retrieving tools from the car "with which the murder would eventually be committed, Draper asked Mr. Norwood, "So you like boys?" to which Mr. Norwood responded, "Yea." Additionally, Dr. David Lisak interviewed appellee on January 11, 2012, January 27, 2012 and February 29, 2012 for a total of approximately 12 hours. Following these interviews, Dr. Lisak wrote that appellee gave him a detailed account of how his sexual relationship with Mr. Norwood began, and how during their multiple sexual encounters, violence had erupted on previous occasions. *Appendix to Petition for Post-Conviction Relief*, 7/16/2012 at Table 12. Due to the posture of the proceedings before this Court, this Court did not hear testimony from Dr. David Lisak, and no one has heard testimony from appellee regarding sexual encounters between him and Mr. Norwood. There has thus been no opportunity for their credibility to have been determined.

Appendix F

Additionally, any sexual encounter appellee may have had with Mr. Norwood is critically different from the evidence that the government suppressed[50] The

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50. Had evidence that Mr. Norwood was sexually involved with other teenage boys been disclosed, it would have corroborated and credited appellee's own experience. As noted *supra*, appellee had never testified as to his own experience with Mr. Norwood or others, although there was certainly information from other witnesses – some of whom were called by the Commonwealth at his two trials – about his having been sexually active with older males from a young age. This Court has certainly seen in recent years and in cases of such high publicity as the recent Jerry Sandusky trial that young male victims of older male sexual abuse typically do not report such behavior and find it extremely difficult and painful to talk about it.

At trial, appellee testified that, on the night of the killing, a friend, Michael Hopkins, introduced him to Amos Norwood for the first time. N.T. 1/27/1986 at 1178-79. The fact that appellee's trial testimony is inconsistent with the argument that would flow from the suppressed evidence is not dispositive of whether the prosecutor had a duty to disclose such evidence under *Brady*. As stated *supra*, in *Ly*, our Supreme Court held that evidence supporting an alternate defense theory was "improperly withheld" after recognizing how the withheld evidence specifically could have been used at trial. *Ly*, 980 A.2d at 78. The fact that "a defendant may predicate a *Brady* claim upon prosecutorial suppression that causes the defendant to 'abandon lines of independent investigation, defenses, or trial strategies that [he] otherwise would have pursued,'" means that appellee's trial testimony that he only met Mr. Norwood the night of the murder does not spoil the instant claim. *Maynard v. Gov't of the Virgin Islands*, 392 Fed. Appx. 105 (3d Cir. 2010) (non-precedential opinion), *citing U.S. v. Bagley*, 473 U.S. 667, 683 (1985) (Blackmun, J., concurring). Had the prosecution disclosed evidence of Mr. Norwood's homosexual ephebophilia in a timely fashion, a reasonable defense attorney could have pursued a penalty-phase strategy centered around Mr.

suppressed evidence would have allowed reasonable trial counsel to argue that Mr. Norwood was not in control of his impulses. And it would have afforded appellee the opportunity to compare himself to other young victims – whether he testified or not – in contrast to the prosecution's portrayal of him during the penalty-phase closing argument as a cold, calculating killer.[51] But without the suppressed evidence of specific instances of Mr. Norwood's sexual improprieties with other teenagers, any allegation or insinuation from appellee that he had a sexual encounter with Mr. Norwood, which in turn played a role in the commission of the crime, would have merely seemed like an attempt by appellee to sling mud on the victim's character. In other words, that theory would have been incredible. Armed with the complete picture of Mr. Norwood's ephebophilia, appellee "could have much more

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Norwood's sexual improprieties with teenage boys, and how that was a "circumstance of [appellee's] offense" under 42 Pa.C.S. § 9711(e)(8).

51. During her closing argument at the penalty phase, Ms. Foulkes stated:

> He has taken two lives, two innocent lives of persons who were older and perhaps unable certainly to defend themselves against the violence that he inflicted upon them. He thought of no one but himself, and *he had no reason* to commit these crimes. He would have gone on committing those crimes had our system of justice not stopped him. I am asking you, ladies and gentlemen, to impose the death penalty because our system of justice must stop him. He must be stopped.

N.T. 2/3/1986 at 1876-77 (emphasis added).

effectively attacked the Commonwealth's case" at the penalty phase.[52] *Simmons*, 590 F.3d at 238.

Brady Components

There are three essential components that appellee must demonstrate in order to establish a *Brady* violation: (1) the evidence was favorable to the accused, either because it is exculpatory or because it is impeaching,

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52. In *Commonwealth v. Martin*, a capital case, a 74-year old homosexual male, Guy Goodman, had written, called and visited the defendant while he served a sentence at the Lebanon County Correctional Facility. 5 A.3d 177, 180 (Pa. 2010). The defendant was given permission to leave the prison for two hours. Along with a conspirator, he took that time to go to the home of Mr. Goodman, who propositioned the defendant for sex in exchange for money. The defendant responded by striking the man in the head with a vase, and then duct-taped a plastic bag over Mr. Goodman's head, stole his property and left him to die. *Id.* at 181. Our Supreme Court concluded that trial counsel had been ineffective for failing to present evidence at the penalty phase that the defendant had been treated for mental disorders arising from sexual abuse by his own uncle, as it would have supported mitigating factors §§ 9711 (e)(2), (3). *Id.* at 203. The *Martin* Court's conclusion that counsel was ineffective for failing to present that evidence was grounded in the notion that evidence tending to establish an illicit relationship between the victim and the defendant is relevant for mitigation. *Id.* at 202 (finding that the defendant's history of sexual abuse and "the sexual advances the male victim made to Martin immediately prior to the murder placed Martin under the influence of extreme mental or emotional disturbance at the time of the murder," a mitigating factor). The fact that the evidence probative of such a relationship is circumstantial – as the suppressed evidence was in this case – does not make it less relevant.

(2) the evidence was suppressed by the Commonwealth, either willfully or inadvertently, and (3) the evidence was material, in that its omission resulted in prejudice to the accused. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *Commonwealth v. Dennis*, 17 A.3d 297, 308 (Pa. 2011) (reversing the order of the first and second elements).

3. "Essential Component" of Brady #1

The first "essential component of a *Brady* violation" requires that the evidence at issue be admissible, relevant to the jury's decision, and "favorable to the accused because it is exculpatory or because it is impeaching." *Strickler*, 527 U.S. at 281-82.

In the instant case, the suppressed evidence could have played a role at trial to impeach doe testimony of Mamie Norwood and of Reverend Poindexter, and its absence was relied upon by the trial prosecutor for her penalty-phase closing argument. The information eliminated from the respective statements of Mamie Norwood and Reverend Poindexter would have allowed a reasonable defense attorney to impeach them after they testified to the following:

(a) Mamie Norwood:

> ADA FOULKES: You had indicated, in response to questions by the defense attorney, that your husband didn't pick up strangers. Did your husband have occasion to take young people back and forth from time to time in his car?

MAMIE NORWOOD: The ones that he worked with, yes, that I knew.

ADA FOULKES: How much of his time would you say, if you know, how often would he do that? Often? Rarely? Middle?

MAMIE NORWOOD: It would be every week at some point.

ADA FOULKES: And then from time to time, he would chauffeur young people from one point to another; would he not?

MAMIE NORWOOD: The ones that I know he works with, yes.

ADA FOULKES: When he would do that, would he take those young people home?

MAMIE NORWOOD: Yes.

ADA FOULKES: From time to time, did you ever see evidence of that chauffeuring process by things left in your car?

MAMIE NORWOOD: Yes, sometimes.

N.T. 1/14/1986 at 157-58.

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(b) Reverend Charles Poindexter[53]:

> ADA FOULKES: Did Mr. Norwood have any special responsibility in the church regarding youth?
>
> REV. CHARLES POINDEXTER: Yes, he did.
>
> ADA FOULKES: What were those responsibilities?
>
> REV. CHARLES POINDEXTER: He was warden for many years of the acolytes or the

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53. In its Motion to Dismiss, the Commonwealth acknowledged that Reverend Poindexter's trial testimony was devoid of any reference to Amos Norwood's homosexual ephebophilia:

> Reverend Poindexter did not remotely suggest any of this [impropriety about Amos Norwood] in his testimony at defendant's 1986 trial. In September 1984, Reverend Poindexter reported to *The Inquirer* that the victim "devoted his life almost entirely to working with young people." Reverend Poindexter further commented that St. Luke's had been packed with more than 1,000 mourners at each of two funeral services for the victim and that his ashes were buried in the church yard. *See Philadelphia Inquirer* Article entitled, "When a Model Teenager is Accused of Murder," dated Sept. 6, 1984.

Commonwealth Motion to Dismiss, 9/7/2012, at 32.

service of the church, and he was in charge, he was the founder and in charge of what we called the Youth Theater Fellowship which dealt with youth between the ages of seven and eighteen.

ADA FOULKES: Were there occasions, Reverend, in connection with his duties, where Mr. Norwood would come to the church in the night hours to fulfill some of these duties?

REV. CHARLES POINDEXTER: Yes, there were.

ADA FOULKES: Also, in your contact with Mr. Norwood, did you observe him from time to time transport young people from the church activities to their homes or other locations?

REV. CHARLES POINDEXTER: Frequently.

N.T. 1/14/1986 at 166-67.

[*Re-direct*]

ADA FOULKES: Reverend, from time to time, do the church activities extend beyond the people who are parishioners and members of the church?

REV. CHARLES POINDEXTER: Yes, they do.

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[*Re-cross*]

MR. PANARELLA: Certainly, church activities or functions are for church members; is that correct?

REV. CHARLES POINDEXTER: Well, the activities that Mr. Norwood participated in very often involve young people outside of our parish congregation. In fact, many who are now active came in as a result of that kind of inclusion.

MR. PANARELLA: And that would occur at organized functions; is that correct?

REV. CHARLES POINDEXTER: Not necessarily. Sometimes they were simply trip services where they were invited to participate.

MR. PANARELLA: There were no church services occurring late in the evening on June 11th; were there?

REV. CHARLES POINDEXTER: Oh, no, of course not.

MR. PANARELLA: And there is nothing of any youth activities or anything of that nature that was going to take place at your church at that time; correct?

REV. CHARLES POINDEXTER: No.

MR. PANARELLA: So when you make reference to unusual or that it would not be unusual to have non-church members come to church functions, it would have been extremely unusual to have a non-parishioner at the church when no church functions were going on?

REV. CHARLES POINDEXTER: No, it would not have been.

MS. FOULKES: Objection.

THE COURT: Overruled.

REV. CHARLES POINDEXTER: No, it would not have been.

MR. PANARELLA: It would not have been unusual to have a non-church member at a non-church function late at night when the church wasn't open to the public?

REV. CHARLES POINDEXTER: No.

MR. PANARELLA: That's correct?

REV. CHARLES POINDEXTER: Would you like me to explain?

MR. PANARELLA: Yes.

REV. CHARLES POINDEXTER: Very often,

Mr. Norwood had friends of some of the young people to help with the building of the sets for the plays and, quite often, I saw him with young people or the people who were working with him people that I never knew before.

MR. PANARELLA: Again, you never knew Mr. Williams?

REV. CHARLES POINDEXTER: I never knew Mr. Williams.

MR. PANARELLA: Or Mr. Draper?

REV. CHARLES POINDEXTER: No.

MR. PANARELLA: Now, you were aware, were you not, that Mr. Norwood had some problem in the past?

REV. CHARLES POINDEXTER: Some problem?

ADA FOULKES: Objection, Your Honor.

THE COURT: Just a moment. I am going to sustain it. I don't know quite what it is or how it is related to the circumstances here, so I will have to sustain the objection at this time.

MR. PANARELLA: I have nothing further.

Id. at 172-74.

Reasonable defense counsel, having had this evidence prior to trial, would have pursued an alternate strategy in the defense case-in-chief. Though the decision to testify in one's defense is a decision that a defendant must make for himself/herself, defense attorneys have a responsibility to advise their clients about that decision. *See Commonwealth v. Carson*, 741 A.2d 686, 689 (Pa. 1999) ("It is well settled that the decision to testify on one's behalf is ultimately to be made by the defendant after full consultation with counsel."). With the withheld evidence of Norwood's sexual improprieties with other teenage boys in hand, thereby strengthening the inference that appellee had been sexually exploited by a man almost 40 years his elder, reasonable defense counsel could have attempted to convince his client to stay off the stand. Non-disclosure adversely affected trial counsel's preparation, as consulting with one's client – and being able to discuss the implications of all of the evidence, and particularly of the exculpatory evidence – is a staple of trial preparation. Had the information in the police activity sheet, containing the full statements of both Reverend Poindexter and Mamie Norwood, been included in the statements which were turned over in discovery, it could have been used by a reasonable defense attorney to properly cross-examine both witnesses where they characterized Mr. Norwood as a kind church volunteer who wanted to help out the kids of the neighborhood. When Mamie Norwood testified that her husband only chauffeured young people that he knew from the church, the Commonwealth "opened the door" to her being cross-examined about her knowledge of Mr. Norwood bringing a young, slim male into their

home before driving away with that young man in his car and not returning until the next morning. Likewise, when Reverend Poindexter testified that Mr. Norwood spent a great deal of time with the acolytes and young people building sets for the church's youth theater group, the Commonwealth "opened the door" to cross-examination about Reverend Poindexter's knowledge that Mr. Norwood had been sexually inappropriate with parishioners.

In addition to the cross-examinations of Mamie Norwood and Reverend Poindexter during the trial, reasonable defense counsel would have called Ronald House to testify during the penalty phase to further flesh out the circumstantial evidence demonstrating that Mr. Norwood was a homosexual ephebophile.[54] Even if appellee never testified about experiencing Mr. Norwood's sexual improprieties, this collection of evidence would have been a sufficient basis upon which a reasonable defense attorney could have vigorously attacked Ms. Foulkes' penalty-phase characterization of the victim as "innocent," and argued during his/her penalty phase closing argument that Mr. Norwood had victimized appellee just as he had done to others, and that those sexual advances had impaired appellee's judgment on the night of the murder.

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54. Ronald House's testimony that Mr. Norwood attempted to take advantage of him sexually when the two were alone would have been admissible at the penalty phase in 1986, just as it would be admissible today. Pa.R.E. 401 codified the definition of relevance set forth in *Commonwealth v. Scott*, 389 A.2d 79, 82 (Pa. 1978): "Evidence which tends to establish some fact material to the case, or which tends to make a fact at issue more or less probable, is relevant." Evidence that Mr. Norwood had sexually inappropriate relationships with underage males tends to establish the fact that he also had a sexually inappropriate relationship with appellee.

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Facts which strengthen the inference that Mr. Norwood made sexual advances on appellee significantly color "the circumstances of the offense," adding another dimension crucial to making a truly "individualized assessment, and imposing a sentence that "should reflect a reasoned *moral* response to the defendant's background, character, and crime." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis in original). A reasonable defense attorney would have highlighted how Mr. Norwood's pattern of impropriety was a "circumstance of [this] offense,"[55] offering a reason to view appellee through a mitigating lens. Having established that there is "some" evidence of a mitigating circumstance, a trial judge "shall" instruct the jury on that mitigating circumstance. 42 Pa.C.S. § 9711(c)(1)(ii). When viewed in combination with the details of the crime, evidence of Mr. Norwood's prior improprieties would cast this offense in an entirely different light; the withheld evidence credits and corroborates appellee's own account of having been victimized by Mr. Norwood.[56] Thus, the first essential component that the withheld evidence was favorable to the accused – has been established.

2. "Essential Component" of Brady #2

The second "essential component of a *Brady* violation" requires that the evidence at issue be "suppressed by the government, either willfully or inadvertently." *Strickler*, 527 U.S. at 282. Evidence, whether in the possession of the

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55. 42 Pa.C.S. § 9711(e)(8).

56. For a full discussion of how the withheld evidence would have altered the jury's perception of the "details of the crime," see the "materiality" section *infra*, p. 50-51.

prosecution or the police, is subject to the *Brady* duty to disclose. In order to comply with *Brady*, "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." *Kyles*, 514 U.S. at 437. For over a decade, our Supreme Court has endorsed that same principle. *Commonwealth v. Burke*, 781 A.2d 1136, 1142 n.5 (Pa. 2001) (finding it immaterial that a prosecutor was unaware of relevant statements in police files, given that "[t]his Court cannot ignore the obvious implications of *Kyles*."); *Commonwealth v. Gibson*, 951 A.2d 1110, 1127 (Pa. 2008) ("The prosecution's duty under *Brady* incorporates disclosure of all exculpatory evidence, regardless of whether the defense specifically requests such materials, and extends to evidence in the possession of police agencies of the same government bringing the prosecution.") (internal citations omitted).[57]

In *Brady*, the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment

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57. There is no dispute that the Philadelphia District Attorney's Office and the Philadelphia Police Department are part of the "same government." Ms. Foulkes' handwritten note about Ronald House being touched on his genitals and hearing of other possible incidents of sexual abuse was found in the District Attorney's Office trial box for the Norwood case. (See Attachment D, which was marked as Court-2 in the PCRA hearing before this Court.) The June 1984 activity sheet, which detailed the complete versions of the Poindexter and Norwood interviews, was found in the H-84-127 police box. (See Attachment E, which was marked as P-24 in the PCRA hearing before this Court.) Under *Kyles* and *Burke*, all of this evidence is properly considered to be within the scope of the prosecutor's control.

irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87 (emphasis added). Though the prosecutor's intent is unimportant in a pure *Brady* analysis, Pennsylvania courts have found that prosecutorial "gamesmanship" amounting to a violation of discovery rules can be an independent reason to shape a remedy for a defendant where such gamesmanship prejudices the defendant in his ability to present a defense. *Commonwealth v. Moose*, 602 A.2d 1265, 1273-75 (Pa. 1992) (finding that where the prosecutor hid a statement from defense counsel and told the court that "all available evidence had been provided" requited that a new trial be granted because it prejudiced the defendant and otherwise, the court "would be condoning and encouraging such last minute disclosures and gamesmanship."). The *Moose* Court relied on *Commonwealth v. Thiel*, 470 A.2d 145, 149 (Pa.Super. 1983), where the Superior Court fashioned a remedy for a defendant after the government withheld information that should have been disclosed under Pa.R.Crim.P. 305(B)(1)(f). The *Thiel* Court referred to Pa.R.Crim.P. 305(E), which "gives the trial court broad discretion in formulating remedies for a failure to comply with discovery requirements," as the foundation for its decision to grant a new trial. In both *Thiel* and *Moose*, the courts of our Commonwealth found that the proper remedy for prosecutorial "gamesmanship" which violated the rules of discovery and highly prejudiced the defendant was a new trial; here, this Court found that the proper remedy was a new penalty phase.[58]

The "sanitization" of the statements turned over to defense counsel, and the non-disclosure of the information

58. See the Appendix for this Court's detailed findings.

contained in Ms. Foulkes' handwritten notes demonstrates that evidence was plainly "suppressed." That suffices to establish the second prong of a *Brady* violation.

3. "Essential Component" of Brady #3

The third and final "essential component of a *Brady* violation" requires that "prejudice ... ensued." *Strickler*, 527 U.S. at 282. "Prejudice" in this context is defined by the concept of "materiality." For suppressed evidence to be considered "material," there must be a "reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. In other words, favorable evidence is subject to constitutionally mandated disclosure when it 'could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,"[59] *Cone v. Bell*, 556 U.S. 449, 470 (2009), *citing Kyles*, 514 U.S. at 435.

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59. In its October 2, 2012 filing in the Supreme Court, the Commonwealth argued that the Supreme Court has already decided that, had evidence from the 1998 PCRA hearing been presented to the jury, the jury would still have voted for death rather than life: "That 'evidence' pales in comparison to the evidence before this Court in the prior appeal – evidence from witnesses who claimed that defendant himself was abused by the victim. This Court ruled such evidence insufficient to change the sentencing verdict." *Commonwealth's Reply to Defendant's Response to Emergency Application to Lift Illegal Stay of Execution*, 10/2/2012 at 12-13.

In fact, the Supreme Court's 2004 opinion did not rule that evidence of the victim's homosexual ephebophilia And its potential impact on appellee was insufficient to change the sentencing verdict. Our Supreme Court divided the evidence appellee put forth about

counsel's ineffectiveness at trial into three different categories. The Court's review of "the prejudice prong of the ineffectiveness inquiry," which is "in terms of whether 'there is a reasonable probability that at least one juror would have struck a different balance,'" practically was limited to the evidence that appellee claimed trial counsel should have presented. *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).Writing for the majority, Mr. Justice Eakin first affirmed Judge Savitt's decision that trial counsel was not ineffective for failing to rely on Dr. Edwin P. Camiel's 1985 presentence report given that the report gave "no indication of petitioner's mental impairment at the time of the murder." *Williams II*, 863 A.2d at 520. The Court then affirmed Judge Savitt's conclusion that trial counsel was not ineffective for failing to present witnesses who could have testified to appellee's abusive childhood. *Id.* at 519-21. Lastly, the Court endorsed Judge Savitt's conclusion that trial counsel was not ineffective for failing to present mental health experts on Appellee's behalf. *Id.* When upholding Judge Savitt's decision that appellee failed to demonstrate a reasonable probability that the introduction of mental health expert testimony would have undermined confidence in the verdict, Mr. Justice Eakin deferred to Judge Savitt's determinations in weighing the evidence: "Accordingly, we perceive no abuse of discretion by the PCRA court in weighing the evidence, and we will not disturb the court's determination." *Williams II*, 863 A.2d at 520.

But, as noted *supra*, after the Commonwealth confirmed Judge Savitt's incomplete understanding of the evidence that "there is nothing in the case involving Norwood's homosexuality or violation of young boys," Judge Savitt dismissed the impact that such information would have had when he engaged in weighing the testimony. N.T. 4/8/1998 at 158-59, 181-82; N.T. 4/9/1998 at 360-61; N.T. 4/13/1998 at 597-605. In other words, Judge Savitt found that any evidence of Amos Norwood's homosexual impropriety was not worthy of consideration in light of the Commonwealth's misrepresentation that it did not exist. Accordingly, neither Judge Savitt nor our Supreme Court has ever had occasion to address whether or not

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> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to ... reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice.

Brady, 373 U.S. at 87-88.

When undertaking the "materiality" analysis, the Court in *Kyles* echoed that "[f]our aspects of materiality under *Bagley* bear emphasis" to help guide the determination. *Kyles*, 514 U.S. at 434. The fourth aspect is particularly relevant to this case: "materiality is to be judged by reference to the "suppressed evidence considered collectively, not item-by-item" with the focus on the "cumulative effect of suppression." *Kyles*, 514 U.S. at 437; *Ly*, 980 A.2d at 84. Practically, courts analyze the "cumulative effect of suppression" through two inquiries: whether suppression negatively impacted the defense's case, and whether the government took advantage of the fact that evidence favorable to the accused was withheld.

In *U.S. v. Perdomo*, the Third Circuit measured the impact of suppression on the defense's case by considering the "possible effects of non-disclosure on the defense's trial preparation," and by asking whether had that

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there is a reasonable probability that, had reasonable trial counsel presented to the jury the suppressed evidence of Amos Norwood's sexual improprieties with teenage boys, such evidence would have undermined confidence in the verdict at the penalty phase.

evidence been "*disclosed and used effectively*, it may make the difference between conviction and acquittal." 929 F.2d 967, 971-72 (3d Cir. 1991) (emphasis in original). In that case, the government unknowingly misrepresented to the defense that its key witness did not have a criminal history, despite that witness in fact having two prior convictions. *Id.* at 970-72. "Such information would have been critical in presenting the witness' mental state, demeanor and behavior to the jury, and in questioning the witness' credibility." *Id.* at 972. The *Perdomo* Court stressed that the impact of suppression on the testimony that the defense "would have been able to elicit" was magnified by the government's misrepresentation, which misleadingly induced defense counsel into believing that the witness could not be impeached. *Id.* The cumulative impact of suppression presented an "undisputable argument that a *Brady* violation occurred." *Id.* at 974.

While the *Perdomo* Court tackled the "materiality" question from the perspective of how suppression impacted the defense's case, a number of other cases have emphasized that evidence is more likely to be considered "material" when the government seizes upon and exploits the presence (or absence) of the suppressed evidence. The *Kyles* Court considered the "word of the prosecutor" relevant to the materiality computation. The United States Supreme Court found impeachment evidence of two witnesses to be material in part because that evidence contradicted the argument set forth by the prosecutor during closing arguments. *Kyles*, 514 U.S. at 444 ("The likely damage is best understood by taking the word of the prosecutor, who contended during closing

arguments that Smallwood and Williams were the State's two best witnesses."). In *Banks v. Dretke*, as part of its "materiality" or "prejudice" analysis under *Brady*, the Supreme Court echoed that a prosecutor's comments may be relevant.[60] The fact that a prosecutor exploits the absence of suppressed evidence during its penalty phase closing argument – as the trial prosecutor did here – is another reason to consider the suppressed evidence "material":

> Regarding "prejudice," the contrast between *Strickler* and Banks's case is marked ... Most tellingly, the witness' testimony in *Strickler* "did not relate to [the defendant's] eligibility for the death sentence"; it "was not relied upon by the prosecution at all during its closing argument at the penalty phase." In contrast, Farr's testimony was the centerpiece of Banks's prosecution penalty-phase case.

Banks, 540 U.S. at 700-01 (citations omitted).

Recently, the Third Circuit blended both components of the materiality inquiry into one "overall" analysis. The

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60. Though *Banks* discussed whether or not there was a violation of the due process right to a fair trial for the prosecution's failure to correct false testimony, the Supreme Court explicitly stated that it granted relief under *Brady* and did not reach the issue as to whether or not relief was merited under *Giglio v. U.S.*, 405 U.S. 150 (1972). 540 U.S. at 690 n.11 ("Because we conclude that Banks qualifies for relief under *Brady*, we need not decide whether a *Giglio* claim, to warrant adjudication, must be separately pleaded.").

Simmons Court engaged in the "materiality" analysis by contrasting the picture that trial counsel would have presented had the suppressed evidence been disclosed against "what actually happened" at trial. *Simmons*, 590 F.3d at 238.

> Overall, the picture of what Simmons's trial would have been like had these four *Brady* violations not occurred is vastly different from what actually happened. The two key witnesses presented by the state would have been substantially less credible, thus undermining the main evidence implicating Simmons in Knaze's death and Cobaugh's assault. Therefore, we agree with the District Court and hold that, cumulatively, the Commonwealth's *Brady* violations leave us without confidence in Simmons's conviction.

Id. at 238-39.

Thus, it was particularly helpful to this Court, in assessing materiality, to compare the evidence in the government's possession against that which was given to appellee's counsel in discovery.[61] *See Dennis*, 17 A.3d at 309 ("A reviewing court is not to review the evidence in

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61. A November 15, 1984 letter from Arnold H. Gordon, Esquire, Chief of Homicide Unit to Nicholas Panarella listed the discovery – other than the Medical Examiner's report, which was sent under separate cover – that was passed upon Mr. Panarella's request. (See the first two pages only of Attachment F, marked Exhibit C-2 in the PCRA hearing before this Court).

isolation, but, rather, the omission is to be evaluated in the context of the entire record.").

(i) A June 1984 police activity sheet revealed that the police learned during a June 22, 1984 interview with Reverend Charles Poindexter that the victim "may have been a homosexual," and that Reverend Poindexter had "in fact received a complaint about five years ago from the mother of a 17 year old parishioner that deceased had propositioned the 17 year old for sex, (male)." Additionally, the activity sheet notes that Reverend Poindexter "added that deceased had worked with juvenile males in the parish for years, doing counciling [sic] work for disturbed males, and males with family problems." (See Attachment E, which was marked P-24 in the PCRA hearing before this Court, page 1). However, the version of the June 22, 1984 interview that the prosecution turned over to the defense omitted those portions of Rev. Poindexter's statement *entirely*. (See Attachment G, which was marked C-2 in the PCRA hearing before this Court, item 19).

(ii) The same June 1984 police activity sheet also revealed that the police learned that Mamie Norwood had told them about a time in which she awoke at 2 AM to find a "young male, slim," standing silently in the hallway of her home. Mrs. Norwood explained to police that her husband woke her to ask her for money. She then watched as her husband loaded some stereo equipment

into his car, and then he got in and drove off with the young man. Mrs. Norwood said that her husband returned home around 9-10 AM the next day and told her a "rambling" story about being "abducted," but that he was able to "escape" after using "psychology" on the captors "until they fell asleep." Mrs. Norwood remembered that he pleaded with her not to get the police involved. Additionally, Mrs. Norwood's eldest daughter was present during the interview, "but made no comment on her belief in the veracity of the story." (See Attachment E, which was marked P-24 in the PCRA hearing before this Court, page 2). However, the version of Mrs. Norwood's statement turned over to the defense omitted this portion of her statement *entirely*. (See Attachment F, which was marked C-2 in the PCRA hearing before this Court, item 17).

(iii) A handwritten note by Assistant District Attorney Andrea Foulkes in the District Attorney's Office's file for the Norwood matter recounted evidence of a specific instance of Amos Norwood's homosexual ephebophilia. She wrote the name of the young man, "Ronald House," "touched on privates," and that he "heard about other possible incidents." (See Attachment D, which was marked Court-2 in the PCRA hearing before this Court). However, none of that information was turned over to the defense.

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Without the evidence in hand that explicitly or inferentially connected Amos Norwood to acts of homosexual ephebophilia, the information that was actually provided to the defense created the false impression that references to Amos Norwood's homosexuality and alleged "kidnapping" had nothing to do with who he really was or with the case.[62] The government did disclose Jesse Lofton's and William Scott's statements, both of which included one question as to the interviewee's possible knowledge regarding Amos Norwood being homosexual. Both interviewees answered in the negative.[63]

Without the evidence above, the defense had two pieces of information suggesting that Mr. Norwood was a homosexual: Ronald Rucker's statement that "Terry said Amos was a homosexual and was the type to pay

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62. The version of Reverend Poindexter's statement turned over to the defense mentioned the supposed "kidnapping." In the statement disclosed to the defense, Reverend Poindexter speculated that the kidnapping had something to do with "drugs" because Mr. Norwood worked as a chemist in New Jersey. Reverend Poindexter thought the incident was reported to the police. He was generally unclear as to what really happened. (See Attachment G, which was marked C-2 in the PCRA hearing before this Court, item 19). The fact that there was a clear version of this story from the one person who was an eyewitness and would actually know what happened – Mamie Norwood – goes to show that the defense was given a misleading, confusing picture based on the speculation of others.

63. See Attachments L (page 2) and M (page 3), marked C-2 in the PCRA hearing before this Court, referring to items 13 and 24, respectively.

people,"[64] and Draper's statement that, shortly before killing Mr. Norwood, appellee "was going to tell [Mamie Norwood] that Amos was gay. He wanted to extort money from him, but she did not pay no [sic] attention to him, she just kept walking to the house."[65] And the defense had one nebulous piece of information suggesting that Mr. Norwood was an ephebophile – Draper's statement that when he was alone with the victim in the cemetery, he asked Mr. Norwood, "So you like boys?" to which Mr. Norwood responded, "Yea."[66]

In two different places during her penalty-phase closing argument, the trial prosecutor's comments about appellee's motive for the commission of this crime could have been effectively rebutted – or precluded – had the suppressed evidence been disclosed. First, she said:

> Now ladies and gentlemen, you know the horrible circumstances of the death of Amos Norwood. You know that the defendant, Terrance Williams, for no other reason but that a kind man offered him a ride home, that he and another man tied him up in the darkness of a cemetery, and beat him to death, squashed him like a bug that you might be irritated with against a windshield, beat him with two blunt instruments.

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64. See Attachment N, which was marked P-10 in the PCRA hearing before this Court.

65. See Attachment O, which was marked P-2 in the PCRA hearing before this Court.

66. *Id.*

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N.T. 2/3/1986 at 1873.

Shortly thereafter, the trial prosecutor concluded, "He has taken two lives, two innocent lives of persons who were older and perhaps unable certainly to defend themselves against the violence that he inflicted upon them. He thought of no one but himself, and he had no reason to commit these crimes." *Id.* at 1876-77.

However, as someone who had the privilege of viewing the suppressed evidence in the government's possession collectively during the kind of trial preparation in which reasonable defense counsel would also have engaged, Ms. Foulkes admitted at the PCRA hearing before this Court, "Did I suspect that there was a sexual connection between them? Yes I did." When this Court asked her, "so maybe [Williams] is doing Norwood and getting money?" she responded, "No. Of course it occurred to me ...." N.T. 9/20/2012 (P.M.) at 109-10. Ms. Foulkes stated "of course" she felt that there was a homosexual relationship between appellee and Norwood because she was able to connect all the dots. Without access to that same evidence, defense counsel was misleadingly induced into accepting the characterizations of Norwood that were included in the discovery packet, such as William Scott's statement that Norwood was "one of the straightest persons as far as I knew." (See Attachment M). Had evidence of Norwood's sexual proclivities for teenage boys been *"disclosed and used effectively,"*[67] a reasonable defense attorney could have drawn the jury's attention to such evidence during

67. *Perdomo*, 929 F.2d at 972.

the penalty phase, enabling the jury to connect the dots about a man in his mid-50s having a sexual relationship with yet another teenage boy.

Instead of having the trial prosecutor rebut her own penalty-phase closing argument more than 26 years after delivering it, had she disclosed the suppressed evidence, a reasonable defense attorney would have been able to directly contradict or prevent her argument that day. Not only would reasonable defense counsel have directly rebutted the centerpiece of the Commonwealth's penalty-phase closing argument – that appellee killed Amos Norwood "for no other reason but that a kind man offered him a ride home"[68] – but that attorney would have then explained how the sexual pressure imposed on appellee by Norwood was a "circumstance of his offense," as it clouded his judgment. The United States Supreme Court suggested in *Cone* there was a reasonable probability that, had the suppressed evidence crediting and corroborating an explanation for a defendant's aberrant behavior been disclosed, the result of the proceeding at the penalty phase would have been different. *Cone*, 556 U.S. at 470. Under Tennessee law, evidence tending to establish that a defendant's judgment was "substantially affected" is relevant to a jury's consideration as to whether death is the appropriate sentence. *Id.* at 456 n.3. Though the Supreme Court found that it would be inappropriate to be the first court to make the "materiality" determination, the Court noted that the suppressed evidence "may have persuaded the jury that Cone had a far more serious drug problem

68. N.T. 2/3/1986 at 1871-75.

than the prosecution was prepared to acknowledge, and that Cone's drug use played a mitigating, though not exculpating, role in the crimes he committed." *Id.* at 475.

Likewise, each of the documents withheld by the government in this case shared a common feature: each strengthened the inference that the victim was sexually involved with multiple teenagers in his community, and that potentially included appellee. As in *Cone*, the suppressed evidence would have been pertinent to explaining the bizarre behavior of the accused, as well as circumstances which might have motivated the killing. In both cases, the accused committed atrocious, violent crimes. *See Williams*, 637 F.3d at 200-01; *Cone*, 556 U.S. at 453. And, in both cases, the suppressed evidence could have been used at trial to persuade the jury that the defendant's judgment was "substantially affected," in contrast to the government's presentation of Mr. Cone as a "calculating, intelligent criminal who was fully in control of his decisions and actions at the time of the crimes,"[69] and in contrast to the government's presentation of appellee as a calculating, heartless killer,[70] despite having "all kinds of advantages." N.T. 2/3/1986 at 1873-75.

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69. *Cone*, 556 U.S. at 454.

70. The prosecution argued that appellee decided to pursue a life of crime, which culminated in his decision to "squash[] [the victim] like a bug that you might be irritated with against a windshield." N.T. 2/3/1986 at 1973.

Appendix F

Though the government suppressed only a few choice statements, the impact of suppression was far-reaching.[71] As part of the consideration of "the defendant's ability to investigate alternate defense theories and to formulate trial strategy"[72] this Court found that reasonable defense counsel could and would have taken the following measures had the suppressed evidence been disclosed: during the penalty phase, reasonable defense counsel would have re-called Reverend Poindexter, questioning the Reverend about the basis of his belief that Mr. Norwood was a homosexual, that Mr. Norwood had used his position at the church to surround himself with adolescent boys – he had in fact established a Youth Theater group, and that complaints had been lodged about Norwood's sexual advances on some of those boys. That testimony would have changed at least one juror's view of Mr. Norwood.

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71. In *Lapointe v. Commissioner of Correction*,_ A.3d _, 138 Conn.App. 454 (Oct. 9, 2012), the Appellate Court of Connecticut held that a police detective's note – which read "30-40 mins. Poss." – reflecting information that the detective had received from fire marshals as to a possible burn time of a fire allegedly set by the defendant, was suppressed. The *Lapointe* Court found that this evidence, which would have been used to buttress an alibi defense, was "material." As demonstrated by *Lapointe*, even small handwritten notes found in the government's files will be considered "material" when supporting a theory that contradicts evidence of guilt put forth by the prosecution. While this recent case obviously has no precedential value in Pennsylvania, this Court found *Lapointe* to be helpful, as Ms. Foulkes' handwritten notes and the other items suppressed would have supported a theory contradicting evidence of culpability meriting death put forth by the prosecution.

72. *Ly*, 980 A.2d at 76.

It would have been natural to second-guess whether Mr. Norwood intended to engage in a sexual act with appellee on the night of the murder. Viewed through that lens, reasonable defense counsel would also have recalled Mamie Norwood in order to highlight the parallels between the decedent's actions on the night of the killing and the night in which Mr. Norwood brought a "young male, slim" into his home, then drove that person away in his car and did not return until the next morning. Draper testified at trial that appellee – a young, slim male – went into Mr. Norwood's home "for like 15, 20 minutes, and I was wondering what was taking him so long, so I walked back down the street, and that's when he was coming out of the house." N.T. 1/22/1986 at 668. After appellee emerged from Mr. Norwood's home with $10, Mr. Norwood picked appellee up in his car and drove off for a few minutes. *Id.* at 671-72. When they returned, appellee told Draper to ask for a ride home; Draper got in the car and directed Norwood, ultimately ending up at the cemetery, where he was killed. *Id.* at 672-75. The similarities between the night of the murder and the previous suspicious late-night activity with an adolescent boy supports the argument that appellee was another one of Norwood's teenage sexual targets. And finally, appellee would have called Ronald House to testify that when he and Mr. Norwood were alone, Mr. Norwood propositioned him for sex and touched his genitals.[73]

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73. Of course, armed with all of this evidence connecting these dots, reasonable defense counsel would also have hired an investigator to speak to the acolytes and youth theater participants with whom Amos Norwood worked at St. Luke's. *See* N.T. 1/14/1986 at 157-58; 166-67; 172-74. Many more victims of Mr. Norwood's ephebophilia might well have turned up.

Viewed cumulatively, the non-disclosed evidence would have enabled appellee's attorney to argue *credibly* in his closing argument during the penalty phase that Amos Norwood was a homosexual ephebophile who had taken advantage of a number of boys, including appellee. Appellee's penalty-phase closing argument could have focused on explaining how appellee's judgment was "substantially affected" by Norwood's sexual impropriety, which "may have been enough to have one juror find a mitigating circumstance, at which point the jury would have had to weigh the mitigating circumstances against the aggravating circumstances."[74] *Ly*, 980 A.2d at 85, *citing Commonwealth v. Rush*, 838 A.2d 651, 661 (Pa. 2003).

Considering the totality of the circumstances, including possible effects of non-disclosure on the defense's trial preparation, an argument by a reasonable defense attorney about how evidence of Norwood's sexual misbehavior with teenage boys meant that appellee lashed out as a result of having been sexually abused may have been enough to have one juror find a mitigating circumstance under § 9711(e)(8). Had evidence crediting appellee's experience with Norwood been available, it would have "tend[ed] to ... reduce the penalty," thereby

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74. If the jury was deadlocked, unable to unanimously vote for death, the judge would be required to impose a sentence of life imprisonment. *See* 42 Pa.C.S. § 9711(c)(v) ("The court may, in its discretion, discharge the jury if it is of the opinion that further deliberation will not result in a unanimous agreement as to the sentence, in which case the court shall sentence the defendant to life imprisonment.").

"cast[ing] the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice." *Brady*, 373 U.S. at 87-88. Cumulatively, this evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict" of death. *Cone*, 556 U.S. at 470.

Appellee demonstrated that this Court had jurisdiction and, for all of the reasons stated herein, that he is entitled to relief in the form of a new penalty phase.

BY THE COURT:

/s/_____
M. TERESA SARMINA, J.

APPENDIX G — APPENDIX TO OPINION OF COURT OF COMMON PLEAS-PHILADELPHIA COUNTY, DATED NOVEMBER 27, 2012

At the outset of the trial of appellee's case, the Honorable David N. Savitt explicitly directed the trial prosecutor, Ms. Foulkes, to not only fulfill her ordinary obligations to disclose exculpatory evidence, but to go beyond that and to turn over to the defense evidence that could be "peripherally" construed as exculpatory:

> Any evidence that is exculpatory to the defendant in this case, the Commonwealth is directed to make available to counsel. In determining what is exculpatory, I would ask that you construe it liberally, even peripherally so and that does not mean it is admissible. It is simply something to show Mr. Panarella. It is important you have evelything."

NT 1/6/1986 at 105.

Ms. Foulkes, however, did not comply with the Judge's directive. Instead of showing Mr. Panarella "everything," Ms. Foulkes did not share evidence favorable to appellee which was squarely within her possession. She did not inform Mr. Panarella that she knew Mr. Norwood had groped 16-year old Ronald House "on privates"[1]; that Reverend Poindexter knew that parishioners lodged "complaints" regarding Mr. Norwood's sexual

1. NT 9/20/2012 (P.M.) at 120-23; see Attachment D, marked as Exhibit Court-2 before this Court, page 2.

impropriety[2]; that as part of Draper's plea agreement, she would write to the Pennsylvania Board of Probation & Parole (Parole Board) on his behalf, detailing his cooperation with the government[3]; and that Mamie Norwood had informed her that after seeing appellee's photograph in the newspaper she remembered he was the one on her porch the day her husband disappeared.[4] Additionally, Ms. Foulkes failed to locate and turn over exculpatory evidence located in the police files. She did not provide a June 1984 Activity Sheet, in which Mrs. Norwood recounted a night where she woke up and saw both her husband and a young, slim male in the house, and then watched from the window as they got into Mr. Norwood's car and drove off.[5] That same activity sheet

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2. See Attachment Q.

3. See Attachment P, marked as P-15 in the PCRA hearing before this Court.

4. N.T 1/14/1986 at 120; see Attachment R, which was not marked as an exhibit in the PCRA hearing before this Court. Prior to the evidentiary hearing on September 20, 2012, appellee's counsel reviewed the contents of the District Attorney's trial boxes for less than six hours. Given the tight deadline imposed by the fact that appellee's execution was scheduled for October 3, 2012, a complete review of the flies was not practicable for anyone in the time allotted. In the interests of concluding its review, this Court again went through the contents of the files after the completion of the evidentiary hearing. Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen this document.

5. See Attachment E, marked as P-24 in the PCRA hearing before this Court.

also detailed a complaint from the mother of a 17-year-old parishioner about Mr. Norwood propositioning the boy for sex. Instead of following Judge Savitt's order to get "everything" to Mr. Panarella, Ms. Foulkes did not do so, even though the discovery packet containing the statements of Mrs. Norwood and Reverend Poindexter did not include the portions of their statements directly and indirectly substantiating Mr. Norwood's homosexual ephebophilia.

There is a common thread tying together the evidence that the trial prosecutor failed to disclose: almost every piece of evidence strengthens the inference that Mr. Norwood was sexually inappropriate with teenage boys, and had some semblance of a relationship with appellee. Not only does that pattern of non-disclosure violate appellee's due process rights under *Brady*, as well as the mandatory disclosure provision of the Pennsylvania Rules of Criminal Procedure,[6] but it also calls into question the trial prosecutor's intent as the architect of this prosecution. This Court found that, based on her decisions to disregard Judge Savitt's directive and based on her testimony at the September 2012 PCRA evidentiary hearing, Ms. Foulkes exhibited "gamesmanship," choosing not to disclose evidence that would have supported the contention that appellee had been the victim of Mr. Norwood's sexual advances.

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6. Pa. R. Crim. P. 305(B)(1), now codified at 573(B)(1), controlled at the time of appellee's trial. Rule 305(B)(I)(a) required that the Commonwealth disclose material evidence in the possession of the Commonwealth's attorney. Rule 305(B)(1)(d) mandated disclosure of "circumstances and results of any identification of the defendant by voice, photograph, or in-person identification."

Appendix G

In the Herbert Hamilton case, for which Ms. Foulkes had prosecuted appellee in early 1985 — nearly one year before prosecuting him in the Amos Norwood case — Ms. Foulkes aggressively sought a first degree murder conviction and imposition of the death penalty. She described the Hamilton prosecution to this Court as "an appropriate first-degree case." N.T. 9/20/2012 (A.M.) at 10, 80. This Court concurs that it was, in fact, an appropriate case for first degree murder. However, the jury returned a verdict of third degree murder. The trial judge, the Honorable Alfred F. Sabo, Jr., himself commented at appellee's sentencing that the verdict did not match up with the evidence presented: "This was a most horrible crime. How they came to third-degree, the intent to do bodily harm but not to kill, is beyond me." N.T. 6/3/1985 at 19. Despite the trial court's admission that the third degree verdict shocked him, Ms. Foulkes testified in the hearing before this Court that "[t]here was certainly a lot of issues [sic] here in any event and I didn't think it was an inappropriate verdict." N.T. 9/20/2012 (A.M.) at 80. Ms. Foulkes stated that she "didn't mind what the — what the verdict was." *Id.* And again later in the hearing, Ms. Foulkes reiterated that position:

> I didn't care what the verdict was as long as the jury considered all the evidence. I presented it to the best of my ability. If this had not been a death penalty, if the jury had not come back with the death penalty, that would not have worried me. If the juror [sic] had come back with third degree in the second case, that would not have bothered me.

N.T. 9/20/2012 (P.M.) at 95.

However, this Court did not find that testimony credible. This Court found that the third degree verdict in the Hamilton case colored Ms. Foulkes' decisions when she prosecuted appellee for the murder of Amos Norwood. First, Ms. Foulkes identified what she believed to be the reason that the jury returned a "compromised" verdict.[7] And then she attempted to eliminate evidence which caused the "compromised" verdict from being presented to the jury. In the hearing before this Court, Ms. Foulkes hypothesized that "a lot of issues" in the Hamilton case explained the jury's decision to return an inconsistent verdict. When asked what she meant by "issues," Ms. Foulkes responded, "Well, there were these sexual overtones and relationships and what have-you." N.T. 9/20/2012 (A.M.) at 80. The "sexual overtones and relationships," which she credited with leading the jury to reach a compromise verdict, revolved around the fact that a middle-aged man may have been paying appellee, still in his teens, for sex.

> In her opening statement in the Hamilton case, Ms. Foulkes had stated:
>
> However, Terrance Williams also had a secret life, and that secret life was his engagement in making money by hustling homosexuals for favors, for money, for clothing, for anything of value to him, and Herbert Hamilton was one of a number of people that Terrance Williams engaged in this.

7. N.T. 9/20/2012 (A.M.) at 79.

Appendix G

> Herb Hamilton was not the only individual with whom Terrance Williams engaged in this kind of enterprise. You'll hear from Marc Draper that Terrance Williams had told him that he on other occasions sought to earn money, make money, what have you, by having homosexual acts with various individuals.

NT 2/14/1985 at 23.

And, during the trial of the Hamilton case, Ms. Foulkes represented to the Court, during her direct examination of Draper, that appellee was sexually involved with multiple older men.

> ADA FOULKES: Let me ask you this: do you know on how many occasions he had engaged in this kind of activity, that is, in exchange for sexual favors for money or for clothing or something of that nature —
> MR. GALLAGHER: Objection.
> ADA FOULKES: — based on what he told you?
> MR. GALLAGHER: Objection.
> THE COURT: Could I see you? Where are you trying to go? I don't understand your question.
> ADA FOULKES: That we're not talking about one person, we're talking about several different people, not just one individual. The purpose of the testimony is to indicate that Herb Hamilton is not the only person that he has ever engaged in this kind of activity with.

N.T. 2/20/1985 at 350-51.

> ADA FOULKES: All right. Now, on the other occasions that Terry discussed how he obtained money, had Terry indicated to you that with other individuals from whom he obtained money or clothing, that he engaged in sexual relations?
> MR. DRAPER: Yes.

Id. at 354.

Ms. Foulkes admitted to this Court that her knowledge of appellee's sexual past created an obvious implication that his relationship with Amos Norwood was substantially similar to his relationship with Herbert Hamilton. She testified, "Did I suspect that there was a sexual connection between them [appellee and Amos Norwood]? Yes I did." N.T. 9/20/2012 (A.M.) at 110. But Ms. Foulkes made certain that the jury did not see that sexual connection. When confronted about the existence of evidence supporting *her own* suspicion that Mr. Norwood had been sexually inappropriate with appellee at the PCRA hearing before this Court, Ms. Foulkes grossly misrepresented the evidence in the government's files. She stated that she "had not a scintilla of evidence that Mr. Williams had actually had any sexual relationship with Mr. Norwood." N.T. 9/20/2012 (A.M.) at 135. She told this Court that all witnesses who were asked about Mr. Norwood's homosexual tendencies "all said no." N.T. 9/20/2012 (P.M.) at 99. Specifically, Ms. Foulkes stated that she "had no information from Reverend Poindexter at the time there was anything untoward about any conduct in the church." *Id.* at 106.

This, however, the Court found to be absolutely contrary to the evidence which Ms. Foulkes had in hand. Hard evidence uncovered during the review of the government's trial files *directly* contradicted Ms. Foulkes' assertions. A note in Ms. Foulkes' own handwriting[8] recounted a specific instance in which Ronald House had been molested by Mr. Norwood.

> THE COURT: Does that refresh your recollection at all? It's a Ms. House and her son Ronald who is 16 years old. He had been in a play and was touched on his private [sic] and then it has some notation, I think in your handwriting, "Heard from others about possible incidents."
> MS. FOULKES: "Touched on privates, I don't do that, nobody would have to know" – I didn't remember this, but yes, there must have been this one report from a Ms. House.
>
> . . .
>
> So when it goes onto [sic] the part that you've highlighted, it says, "Son in play, Ronald, touched on privates, I don't do that, nobody would have to know, brought boy home and asked him not to say anything, and then he stopped coming to church, disappeared," and it says, "Never verified it, and 29 years, first

8. See Attachment D, marked as Exhibit Court-2 in the PCRA hearing before this Court.

> time," and then it says at the bottom, "Heard from others about possible incidents." That must have been Ms. House.

Id. at 121-22.

Additionally, a police activity sheet in the government's trial file revealed that Detective Daniel Bennett had uncovered information about Mr. Norwood being "linked to possible homosexual activities."[9] A handwritten note found in the District Attorney's Office's trial file demonstrates that Ms. Foulkes knew that Detective Bennett's investigation produced specific information about Mr. Norwood's sexual involvement with parishioners at his church.[10]

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9. See Attachment U, which was marked as Exhibit P-28 in the PCRA hearing before this Court.

10. The note in Ms. Foulkes' handwriting, which was not introduced as an exhibit at the PCRA evidentiary hearing, as it was not uncovered until this Court conducted a final review of the government's trial files following the conclusion of the evidentiary hearing, reads: "D. Bennett talks to Rev. Poindexter who advises of other complaints by parishioners re. dec'd's homosexuality." (See Attachment Q). This note suggests that Ms. Foulkes not only knew about Mr. Norwood's sexual orientation, but that she also knew of specific examples of Mr. Norwood's homosexual ephebophilia. Thus, this note is yet another piece of evidence corroborating this Court's conclusion that Ms. Foulkes was not credible when she said that all witnesses asked about Mr. Norwood's interest in teenage boys "said no." Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen this latter document.

Appendix G

Ms. Foulkes' statements to this Court about the dearth of evidence regarding Mr. Norwood's homosexuality weighed heavily on her credibility considering the evidence found in the government's trial files. This Court was unable to believe that she "had not a scintilla of evidence" about a sexual relationship between appellee and Mr. Norwood. This Court was constrained to find that Ms. Foulkes intentionally rooted out information which strengthened the inference of a homosexual connection between appellee and Amos Norwood from being presented to the jury by the defense.

This Court found that Ms. Foulkes chose not to disclose that evidence in an attempt to cure the "issues" that had led to a compromise verdict in the Hamilton case, and to keep as much as possible regarding those "issues" out of the trial of the Norwood case.[11] And after having failed to disclose this evidence, Ms. Foulkes then made a closing argument that contradicted her own belief about the true nature of appellee's relationship with Amos

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11. Not only did Ms. Foulkes keep these "issues" from being presented to the empanelled jury, but she also chose the jury with an eye towards weeding out jurors who might have been sympathetic to victims of sexual impropriety. Ms. Foulkes testified before this Court that a "second reason" she struck venireperson Alberta White was because Ms. White's "son had been sexually assaulted and one of the things that I look for in jurors is whether or not they would be emotionally able to separate out their personal experiences from issues that might arise during trial" N.T. 9/20/2012 (A.M.) at 131. Ms. Foulkes had also testified about striking Ms. White as part of the *Batson* claim raised in the 1995 PCRA petition. N.T. 4/16/1998 at 712.

Norwood.[12] When asked by this Court whether it occurred to her, "maybe he's [appellee's] doing Norwood and getting money," Ms. Foulkes admitted, "Of course it occurred to me." *Id.* at 109. Nonetheless, she argued:

> Now ladies and gentlemen, you know the horrible circumstances of the death of Amos Norwood. You know that the defendant, Terrance Williams, for no other reason but that a kind man offered him a ride home, that he and another man tied him up in the darkness of a cemetery, and beat him to death, squashed him like a bug that you might be irritated with against a windshield, beat him with two blunt instruments.

N.T. 2/3/1986 at 1873.

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12. During the penalty phase of the Norwood case, Ms. Foulkes called ADA Jeffrey Kolansky to testify about appellee's conviction for the burglary and robbery of Don and Hilda Dorfman. During her direct examination of Mr. Kolansky, Ms. Foulkes elicited details of the facts underlying that conviction. She asked Mr. Kolansky about the time of the offense, the nature of the offense, the type of weapon used, and how that weapon was used on Mr. and Mrs. Dorfman. N.T. 2/3/1986 at 1821-23. However, when Ms. Foulkes called Detective Lawrence Gerrard to testify about appellee's conviction for third degree murder in the killing of Herbert Hamilton, she shied away from asking questions about the facts of the offense. Besides basic information like the location, date and age of the victim, the only other question Ms. Foulkes asked was about the cause of death. *Id.* at 1826-28. The fact that Ms. Foulkes chose to present to the jury in the Norwood case some details of the Dorfman robbery, but not to do so with respect to the Hamilton killing is yet another indication that Ms. Foulkes did not want the jury in the Norwood case to learn about what she felt had been "issues" in the Hamilton case.

Appendix G

The major difference between the Hamilton and Norwood cases is that evidence of a sexual relationship between the middle-aged victim and appellee was presented to the jury in the first, but not in the second. The Court is quite mindful that Ms. Foulkes had no duty to do the defense's job for them, and she had the right to present a different theory of the case that focused on a robbery of the victim and not on a relationship that existed or might have existed between the victim and appellee. However, she did have a duty to provide the defense with that evidence, because it was exculpatory and "material." The fact that a portion of Ms. Foulkes' penalty phase closing argument — the culmination of prosecuting appellee for both the Hamilton and Norwood murders – focused on an aspect of the evidence that could have been rebutted by the withheld information more than suggests that Ms. Foulkes was aware of the significance of what was brushed under the rug. This Court concluded that intentionally rooting that evidence out of the Norwood case in order to secure a death penalty sentence amounted to "gamesmanship." As in *Thiel*,[13] where the government failed to disclose information and then "used [it] skillfully in rebuttal," Ms. Foulkes failed to disclose her knowledge of evidence of Norwood's sexual improprieties with teenage boys, as well as her belief that Norwood was sexually involved with appellee.[14] And, then, she

13. 470 A.2d at 149.

14. A review of Ms. Foulkes' notes prior to and during witness preps shows that she was an extremely thorough and meticulous prosecutor who did not want any surprises. When preparing for trial she had no way of knowing that appellee was going to testify that he

skillfully used the non-disclosure of that evidence in her penalty-phase closing argument, seizing the opportunity to characterize Amos Norwood as a sympathetic victim who had merely offered appellee a ride home. In *Thiel*, as noted in the body of this Opinion, our Superior Court labeled the prosecutor's gamesmanship "trial by ambush." Here, Ms. Foulkes' decisions constituted "penalty phase by ambush." Accordingly, this Court considered Ms. Foulkes' conduct as part of its decision to grant a new penalty phase hearing.

In addition, this Court found other behavior of Ms. Foulkes during the course of the Norwood trial to weigh into the finding that she was not credible when she said that she "didn't care what the verdict was as long as the jury considered all the evidence," which she maintained that she presented "to the best of [her] ability." N.T. 9/20/2012 (P.M.) at 95. Instead of following Judge Savitt's directive to make sure that Mr. Panarella had "everything," which would thereby have enabled the jury to consider "all the evidence," Ms. Foulkes withheld evidence that as part of Draper's deal to plead guilty to second degree murder, she promised to write a letter on his behalf to the Parole Board. Ms. Foulkes elicited

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had just met Mr. Norwood on the day of the killing. Everything in her possession pointed to the opposite. Appellee was admitted into Mr. Norwood's home, where he stayed for approximately 20 minutes. Shortly thereafter Mr. Norwood stopped and picked appellee up and drove off with him for a few minutes. Additionally, Ronald Rucker, who was called as a Commonwealth witness, had noted in his July 19, 1984 police interview that "Terry said Amos was a homosexual and was the type to pay people." See Attachment N.

testimony from Draper indicating that his *only* agreement with the Commonwealth was that in exchange for his truthful testimony against appellee, he would plead guilty to second degree murder, robbery and conspiracy for the murder of Amos Norwood. NT. 9/20/2012 (A.M.) at 165-66.

> ADA FOULKES: Now, when an agreement was made between your: attorney, yourself and the Commonwealth, was an agreement that was signed, which you have seen, made between the Commonwealth and your attorney at the time, Mr. Kenneth Dixon?
> MR. DRAPER: Yes.
> ADA FOULKES: Have you seen that agreement?
> MR. DRAPER: Yes.
> ADA FOULKES: Could I have this document marked C-18? Your: Honor, if I may substitute a copy for the exhibit, so I may retain the copy that we have marked.
> THE COURT: Sure.
> ADA FOULKES: Is that agreed, counsel?
> MR. PANARELLA: Yes.
> ADA FOULKES: Mr. Draper, do you recognize the document that's marked C-18?
> MR. DRAPER: Yes.
> ADA FOULKES: Is that the agreement between you and your: attorney and the Commonwealth of Pennsylvania in reference to this case?
> MR. DRAPER: Yes.
> ADA FOULKES: Is it dated August 16, 1984?
> MR. DRAPER: Yes.

ADA FOULKES: Does it read as follows: "This letter will confirm the agreement entered into this date between the Commonwealth -

[Discussion at sidebar, after which Ms. Foulkes read the August 16, 1984 letter to the jury.]

ADA FOULKES: Was that the agreement that you understood and entered into with the Commonwealth in this matter?
MR. DRAPER: Yes.

NT. 1/22/1986 at 660-63.

On cross-examination, Mr. Panarella followed up on Ms. Foulkes' questioning regarding Draper's "deal" with the Commonwealth. Draper's bolded responses to Mr. Panarella's pointed questions were false:

MR. PANARELLA: You have a deal; correct?
MR. DRAPER: Yes.
MR. PANARELLA: And that deal, at some point, was put down in a writing; is that correct?
MR. DRAPER: Yes.
MR. PANARELLA: Can I have C-18. Was there anything more agreed upon between you, your attorney, your family and the police or the District Attorney's office other than what is embodied within this document?
MR. DRAPER: No.
MR. PANARELLA: Nothing at all?
MR. DRAPER: No.

N.T. 1/23/1986 at 778-79 (emphasis added).

This Court found that testimony was false, as the letter Ms. Foulkes personally wrote on June 23, 1988, addressed to the Pennsylvania Board of Probation and Parole (Parole Board) mentioned *another agreement* between Draper and the Commonwealth — an agreement she never disclosed to anyone else.[15] During the PCRA hearing before this Court, Ms. Foulkes read aloud the following portion of that letter:

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15. In *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959), the Supreme Court of the United States expressed disapproval for a conviction supported by a lie:

> A lie is a lie, no matter what its subject, and if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth ... That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.

However, this Court was without jurisdiction to consider a claim under *Napue v. Illinois*, 360 U.S. 259 (1959) or *Giglio v. U.S.*, 405 U.S. 150 (1972) based on Draper's false testimony, given that the letter Ms. Foulkes addressed to the Parole Board had been in the public record since Draper filed a PCRA petition in his own case on May 10, 2000. Accordingly, appellee had failed to raise that claim with reasonable due diligence under 42 Pa. C.S. § 9545(b)(2). It is worth noting, however, that Ms. Foulkes' solicitation of false testimony on direct examination, *and* her failure to correct Draper's false testimony on cross-examination, could have been a potentially viable claim under *Giglio*, as non-disclosure of a promise made to a witness by the government, and subsequent testimony that there was no promise, violates a defendant's due process tight to a fair trial if "the false testimony could ... in any reasonable likelihood have affected the judgment of the jury." *Giglio*, 405 U.S. at 154, *citing Napue*, 360 U.S. at 271.

> Therefore, it is proper for you to consider the cooperation of this inmate when determining his eligibility for parole or commutation at some future date. That I provide you with the particulars of Mr. Draper's cooperation *was the only benefit or promise conveyed to him in exchange for his complete truthful cooperation.* I hope this information will be useful in your evaluations.

N.T. 9/20/2012 (A.M.) at 169 (emphasis added) (See Attachment P, marked as P-15 in the PCRA hearing before this Court).

The fact that Ms. Foulkes knowingly withheld evidence of an agreement with Draper and permitted him to testify falsely that there was no additional agreement contradicts her assertion before this Court that she wanted the jury to have "all the evidence." It is a reason why this Court could not avoid finding that Ms. Foulkes' testimony about being faithful to her discovery obligations was not credible, and that her conduct constituted prosecutorial "gamesmanship."

Yet another indication of Ms. Foulkes' "gamesmanship" was her decision not to provide Mr. Panarella with notice that the decedent's widow, Mrs. Mamie Norwood, was going to identify appellee as the male she had seen on her porch the day her husband went missing. Mrs. Norwood testified that she told Ms. Foulkes that she was able to identify appellee as the man she saw on June 11, 1984 at some point after the August 22, 1984 preliminary hearing. N.T. 1/14/1986 at 130. Ms. Foulkes' knowledge

of Mrs. Norwood's ability to make the identification was corroborated by her handwritten notes. See Attachment R, which was not marked as an exhibit in the PCRA hearing before this Court.[16] At the time of the Norwood trial, Pa. R. Crim. P. 305(B)(1)(d)[17] stated that the following information was subject to "mandatory" disclosure: "the circumstances and results of any identification of the defendant by voice, photograph, or in-person identification." But Ms. Foulkes went ahead and asked Mrs. Norwood to make an in-court identification of appellee without ever having notified Mr. Panarella that she would be able to do so. N.T. 1/14/1986 at 103. Before the Court recessed for lunch, Mr. Panarella objected and moved for a mistrial based on a violation of the Pennsylvania Rules of Criminal Procedure.

> MR. PANARELLA: If it hasn't, then that will allow me to proceed with my cross examination. At some point, she came forward and indicated that there was a positive identification of Mr. Williams, because I cannot believe that the Assistant District Attorney would just ask that question blindly. I believe, Your Honor, that that significant event is something that would have been, should have been made available to the defense.

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16. Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen this document, although the issue of the withholding of this information was discussed at trial and on appeal.

17. Pa. R. Crim. P. 305 was renumbered on March 1, 2000 as Pa. R. Crim. P. 573.

THE COURT: When did you — did you know she was going to identify the defendant? Did she say that previously?
MS. FOULKES: Well, she told me that when she saw him in Court, and when she saw him in the newspapers, that she knew that that was the same made who had been on her porch.
THE COURT: Don't you think that is something that the defense counsel should have been apprised of?
MS. FOULKES: Your Honor, there are a number of things that are certainly discoverable. I don't think that it, in any way, that prejudices him to know or not to know.
THE COURT: If he is entitled to it and it's part of the discovery and it is an identification of a witness, the extent of the prejudice, of course, I am not characterizing or determining but the question first is shouldn't he have been given that information? You really had a statement of a witness who was going to identify a defendant at a crucial circumstance in court, and the order was to give the defense counsel copies of all statements.
MS. FOULKES: I gave copies of all statements.
THE COURT: You had an oral statement. You are saying that an oral statement, you don't have to give him?
MS. FOULKES: I think not, obviously.

N.T. 1/14/1986 at 103-05.

Appendix G

During Mr. Panarella's cross-examination of Mrs. Norwood, both Mr. Panarella and the Court clarified that, after the preliminary hearing, Mrs. Norwood told Ms. Foulkes that she was able to identify appellee as the person she saw on her porch on the night of her husband's murder.

> THE COURT: Did you ever tell the Assistant District Attorney or anyone that you were able to do that?
> MRS. NORWOOD: Yes.
> THE COURT: You may proceed.
> MR. PANARELLA: When you refer to an Assistant District Attorney, and I am correct to say that you are referring to this lady here?
> MRS. NORWOOD: Yes.

N.T. 1/14/1986 at 120.

> MR. PANARELLA: It is only after the preliminary hearing that you apparently come forward and discuss this with the Assistant District Attorney. Is that correct?
> MRS. NORWOOD: Yes.

Id. at 129.

Whether Ms. Foulkes' decision not to inform Mr. Panarella that Mrs. Norwood would identify appellee in court constituted a violation of Pa. R. Crim. P. 305(B)(1)

(d) is unimportant.[18] This Court found that Ms. Foulkes' decision to withhold this identification from Mr. Panarella was indicative of her state of mind while prosecuting appellee, and reflected on her credibility at the PCRA hearing before this Court in light of her steadfast claim that she "didn't care" about the jury's verdict.[19] Ms. Foulkes asserted to this Court that she wanted the jury to have "all the evidence," but this Court is disheartened to say that her actions leading up to and during the Norwood trial demonstrate that she only wanted the jury to see the evidence over which she exerted control.

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18. Mr. Panarella moved for a mistrial on the basis of Ms. Foulkes' failure to disclose Mrs. Norwood's ability to identify appellee. Judge Savitt did not consider Mrs. Norwood's statement to Ms. Foulkes to be an "identification" falling within the purview of Pa. R. Crim. P. 305(B)(1)(d). Had he considered it such, the identification would have been subject to mandatory disclosure. Instead, Judge Savitt found that this was a "substantially verbatim oral statement" falling under Pa. R. Crim. P. 305(b)(2)(ii), which was subject to discretionary disclosure. On appeal from the PCRA Court's denial of appellee's petition, the Supreme Court stated that there was no indication that the identification was deliberately withheld, nor had the identification been obtained by "suggestive means or by any other means in violation of appellant's constitutional rights." *Williams II*, 863 A.2d at 516.

19. Had Ms. Foulkes advised the defense in advance that Mrs. Norwood would be able to identify appellee in court, a reasonable defense attorney would likely have requested that a lineup be conducted. *Commonwealth v. Sexton*, 400 A.2d 1289, 1292 (Pa. 1979) (holding that a trial court cannot arbitrarily and capriciously deny a request for a lineup). Identifying someone in a lineup is much more difficult than when he is sitting alone next to defense counsel.

Appendix G

The last instance of Ms. Foulkes' conduct during the Norwood prosecution that this Court wants to highlight here for the sake of completeness, is that she failed to turn over a criminal complaint and an arrest warrant for a man named Andre Peterson, for having stolen Amos Norwood's credit cards and forged his signature at a jewelry store on June 13, 1984.[20] The Commonwealth did disclose to the defense a statement from Jesse Lofton in which he was asked whether he knew a man named Andre Peterson, as well as three separate statements from Maceo Waring, a jewelry store[21] clerk who sold gold chains to a man claiming to be Amos Norwood.[22] In Mr. Waring's first statement, he identified the man who produced Mr. Norwood's non-

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20. As seen on pages one and two of Attachment F — the table of contents of the discovery packet passed by the Commonwealth on September 15, 1984 — the documents supporting Andre Peterson's arrest for theft by deception and forgery of Amos Norwood's signature were not turned over to the defense. See Attachment S, which was not marked as an exhibit in the PCRA hearing before this Court. Again, this Court cautions that, due to the hurried posture of the proceedings, neither of the parties has seen these documents. This Court did not consider this evidence in its credibility determination of Ms. Foulkes as the Court had no indication prior to its final review of the government's files that anyone but appellee had ever been a suspect regarding the purchase of the gold chains. However, coming across these documents reaffirmed the Court in its earlier determination regarding Ms. Foulkes' credibility.

21. The jewelry store was called Walnut Solid Gold at 1312 Walnut Street, Philadelphia, PA.

22. See Attachment L, which was marked as Exhibit C-2, item 13 in the PCRA hearing before this Court, albeit for a different reason.

photo identification and paid for the gold chains with Mr. Norwood's credit card as Andre Peterson.[23] However, at trial, Ms. Foulkes called Mr. Waring to testify that it was appellee who had purchased the chains. N.T. 1/24/1986 at 933-34. This Court did not give consideration to whether Ms. Foulkes' failure to turn over the documents, which illustrated that there was probable cause to believe that Andre Peterson was the person who used Mr. Norwood's card, amounted to a violation of Pa. R. Crim. P. 305(B). Instead, it is apparent that Ms. Foulkes' failure to turn over the criminal complaint and arrest warrant for Andre Peterson is yet another instance in which the prosecutor erred on the side of not disclosing evidence that could have been favorable to appellee. It is further substantiation for this Court's finding that Ms. Foulkes' assertion that it would not have "bothered" her if the jury in the Norwood case returned a verdict of third degree murder was not credible.[24]

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23. See Attachment T, which was marked as Exhibit C-2, item 29(a) in the PCRA hearing before this Court.

24. This Court also examined Ms. Foulkes' prosecution of appellee in the Hamilton case, and found that she exhibited a pattern of playing "fast and loose" there as well. In the Hamilton case, after she had rested and appellee testified in his defense, Ms. Foulkes attempted to introduce prison letters written by appellee to Draper as evidence of appellee's consciousness of guilt. N.T. 2/21/1985 at 13. When she did so, appellee's trial counsel – Steven Gallagher, Esquire – objected on the grounds that he had previously requested all statements made by appellee, but had not yet received such letters. *Id.* at 619-20. After Mr. Gallagher reiterated his strong objection, Ms. Foulkes brought up the chronology of when she got the letters, clarifying a vague statement that she made earlier that she "got it

in the last week." In what appeared to be an attempt to soften the blow of having failed to disclose the letters, Ms. Foulkes clearly stated that she only received them the same week as the hearing, in late February 1985:

> MS. FOULKES: I might also point out for the record that the specific page or document that will be referred to or would be referred to in this trial I received only this past Monday. So that the record is clear on that.
> MR. GALLAGHER: What was that? You received these documents when?
> MS. FOULKES: This past Monday.
> MR. GALLAGHER: Monday of this week?
> MS. FOULKES: That's right.
> MR. GALLAGHER: That's the first time Draper turned them over to you?
> MS. FOULKES: No. That's when his father turned them over to me. He sent them to his father and his father kept them in safekeeping and then he met with the father for the first time on Monday, the Court holiday, this past week in Mr. Dixon's hospital. Mr. Dixon was in the hospital. That was for the first time.

Id. at 642-43.

However, the documents found in the government's trial file in the proceeding before this Court revealed that Ms. Foulkes had access to these letters roughly two months before the date that she told Mr. Gallagher and Judge Savitt that she had received them. Her handwritten notes indicate that during a prep session on Thursday, December 20, 1984, Draper told her that appellee had been providing him with "written alternate false stories," and "Marc will provide them to [Detectives] Cimino/McNesby next Fri. (See Attachment I, marked as P-8 in the PCRA hearing before this Court). Even if Ms. Foulkes was technically correct that she had only "received" the letters the week of the proceeding

in February, her statement was a shade of the truth. Instead of being forthcoming with the Court and stating that Draper told her about appellee's letters in December, Ms. Foulkes justified not having disclosed the documents by stating that she had only received them that week. Ms. Foulkes' credibility was assessed by this Court in light of her decision to deprive the trial court of relevant facts in order to improve her chances of securing admission of evidence favorable to her case. Just as Ms. Foulkes took questionable measures to help her case for the admissibility of the prison letters, it appears as though she employed a questionable tactic in preventing evidence favorable to appellee from being presented to the jury. Ms. Foulkes admitted to this Court that, during the Hamilton case, she sent Detectives John Cimino and James McNesby to talk to a potential defense witness, Gregory Lowe, before he was to take the stand. N.T. 9/20/2012 (P.M.) at 136-37. Mr. Lowe testified at the September 9, 1990 PCHA Hearing before Judge Sabo that Draper had told him in prison that he got Herbert Hamilton's keys from appellee, went to Hamilton's apartment and stabbed him in the neck after appellee had assaulted Hamilton. N.T. 9/10/1990 at 16. Mr. Lowe explained that he did not proffer that testimony at appellee's trial in the Hamilton case because the detectives told him that if he testified for appellee, "I can kiss my deal out, you know, kiss it down the river." *Id.* at 19. When questioned by this Court about her involvement regarding Mr. Lowe's decision not to testify, Ms. Foulkes denied playing a role. This Court did not accept Ms. Foulkes' testimony on that point, and considered her decision to send the detectives to speak with Mr. Lowe as an indication that she wanted to secure a first degree murder conviction in that Hamilton case and not, as she testified to this Court, that she "was not disappointed in the verdict" of third degree murder. N.T. 9/20/2012 (A.M.) at 79. Ms. Foulkes maintained a tight and careful control over all aspects of the evidence.

Appendix G

As the courts of this Commonwealth stated in both *Moose* and *Thiel*, prosecutorial gamesmanship may play a role in a trial court's decision to fashion an appropriate remedy. *Moose*, 602 A.2d at 1273-75; *Thiel*, 470 A.2d at 149. This Court did not find Ms. Foulkes' assertions that she "didn't care what the verdict was as long as the jury considered all the evidence" credible. Ms. Foulkes represented to this Court at the September 2012 PCRA evidentiary hearing that she did not have a "scintilla" of evidence suggesting a homosexual connection between appellee and Mr. Norwood, and that all witnesses who were asked about Mr. Norwood's homosexual impropriety "all said no." However, those representations turned out to be false, as there were documents in Ms. Foulkes' own handwriting that turned up in the government's files directly contradicting her statements that such evidence did not exist. Thus, this Court was constrained to find that Ms. Foulkes was not credible, and that she suppressed evidence which strengthened the inference that appellee had been the victim of Mr. Norwood's sexual advances. As such, Ms. Foulkes' conduct as the trial prosecutor in the Norwood case would properly be labeled "gamesmanship."

APPENDIX H — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, DATED OCTOBER 3, 2012

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 163 EM 2012, 560 CAP

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

TERRANCE WILLIAMS,

Respondent.

Emergency Commonwealth Application under Pa. R.A.P. 1702(d) & 3316 to Review Order Staying Execution

ORDER

PER CURIAM

AND NOW, this 3rd day of October, 2012, the Commonwealth's application for emergency relief is hereby **DENIED**. The Prothonotary is directed to set a briefing schedule.

Appendix H

A True Copy
As Of 10/3/2012

Attest: /s/_____
John W. Person Jr., Esquire
Deputy Prothonotary
Supreme Court of Pennsylvania

APPENDIX I — ORDER OF CHIEF JUSTICE CASTILLE DENYING MOTION TO RECUSE, DATED OCTOBER 1, 2012

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 163 EM 2012

Respondent's Motion for Recusal
of Chief Justice Castille

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

TERRANCE WILLIAMS,

Respondent.

ORDER

AND NOW, this 1st day of October, 2012, Respondent's Motion for Recusal is **DENIED,** as is the request for referral to the full Court.

s/_____
Chief Justice Ronald D. Castille

APPENDIX J — ANSWER TO RECUSAL MOTION, DATED OCTOBER 1, 2012

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 163 EM 2012

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

TERRANCE WILLIAMS

COMMONWEALTH'S ANSWER TO RECUSAL MOTION

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT:

R. SETH WILLIAMS, District Attorney of Philadelphia County, by his Assistants, RONALD EISENBERG, Deputy, Law Division, and HUGH J. BURNS, JR., Chief, Appeals Unit, respectfully answers defendant's "motion to recuse Chief Justice Castille" in the above matter, and thus states:

1. A seritaim answer is dispensed with for the sake of clarity.

Appendix J

Introduction

The PCRA court, without jurisdiction, granted a stay of execution and a new penalty hearing on defendant's untimely third PCRA petition challenging his 1986 murder conviction, five days prior to his scheduled execution. The Commonwealth moved to vacate that ruling pursuant to Pa.R.A.P. 1702(d) (stating that no separate notice of appeal or petition for review required to challenge stay of execution) and 3316.[1] In response, defendant moved (inter alia) to recuse the Chief Justice. This answer is directed to the Chief Justice rather than the full Court because such motions are within "the sound discretion of the jurist whose recusal is sought." *Commonwealth v. Williams*, 732 A.2d 1167, 1174 (Pa. 1999), citing *Goodheart v. Casey*, 565 A.2d 757, 762 (Pa. 1989); and *Commonwealth v. O'Shea*, 567 A.2d 1023, 1034 (Pa. 1989). The recusal motion is frivolous and should be promptly denied.

Standard of review

A party seeking recusal has the burden "to allege facts tending to show bias, interest, or other disqualifying events." *Reilly v. SEPTA*, 489 A.2d 1291, 1300 (Pa. 1985). The challenged jurist makes a "self-assessment" of his own ability to be fair, and may summarily dismiss "fabricated, frivolous, or scurrilous charges" made in support of a recusal motion. *Municipal Publications v. Court of Common Pleas, et al.*, 489 A.2d 1286 (Pa. 1985). Prior prosecutorial participation in a particular matter is not a *per se* basis for recusal "[a]bsent some showing

1. The complete factual and procedural history are set forth in the Commonwealth's petition under Rule 1702(d).

of prejudgment or bias[.]" *Commonwealth v. Abu-Jamal*, 720 A.2d 121, 124 (Pa. 1998), *quoting Commonwealth v. Darush*, 459 A.2d 727, 731 (Pa. 1983). *See also Commonwealth v. Jones*, 663 A.2d 142, 145 (Pa. 1995) ("recusal is . . . unwarranted where . . . there has been no allegation or showing of any specific prejudgment or bias against petitioner").

Argument

Defendant complains that, as District Attorney of Philadelphia 26 years ago in 1986, Justice Castille "personally authorized his office to seek the death penalty in this case" in the form of a handwritten note addressed to the then-chief of the Homicide Unit of the D.A.'s office stating "Approved to proceed on the death penalty" (recusal motion, ¶2, emphasis and punctuation omitted). This claim is indistinguishable from that in *Commonwealth v. Rainey*, 912 A.2d 755, 757-758 (Pa. 2006) (recusal opinion of Justice Castille), in which Rainey protested that Justice Castille had "decided to seek the death penalty" in his case. There, Justice Castille held that this was not a valid basis for his recusal, explaining that, as the District Attorney, his "formal approval of such recommendations from my assistants, recommendations approved at all levels in the chain of command, simply represented a concurrence in their judgment that the death penalty statute applied, *i.e.*, that one or more of the statutory aggravating circumstances set forth in the Sentencing Code, *see* 42 Pa.C.S. § 9711(d), existed, and nothing more."

Since defendant does not even discuss this holding of Rainey anywhere in his petition (strangely, since his

counsel, Billy Nolas, Esquire, was also Rainey's counsel), he fails to distinguish that controlling case. His argument that his claim has uniquely compelling force because the above notation is "handwritten" (recusal motion, ¶27) simply makes no sense. Regardless of how it was transmitted, the notation was a routine ministerial act inherent in the duties of the District Attorney, and not a sign of some form of personal animosity toward defendant on the part of Justice Castille. Moreover, even if a greater level of involvement in the case had existed on Justice Castille's part as District Attorney (though it does not), it still would not be disqualifying. In Commonwealth v. Darush, the offender was tried before a judge who had been the District Attorney when the offender was arrested and held for court; before assuming the bench, the judge had actually prosecuted the offender on unrelated charges, and had personally interviewed a witness who was later the primary witness in the case over which the judge presided. Nonetheless, this Court held that the judge acted properly in declining to recuse himself because "the record [was] barren of facts showing the trial judge had any actual knowledge of, or participation in, the investigation of the offense." This claim clearly fails.

Defendant contends that Code of Judicial Conduct, Canon 3(C)(1)(b), requires recusal (recusal motion, ¶23), but that provision "creates no right of recusal on behalf of litigants, but merely prescribes standards by which judges should exercise their discretion in ruling upon questions of recusal. The ultimate decision is vested within the sound discretion of the jurist whose recusal is sought." *Commonwealth v. Williams*, 732 A.2d 1167, 1174 (Pa. 1999).

Appendix J

According to defendant, his quotes (or purported quotes; none of this material is of record) of alleged newspaper stories from 1993 establish that Justice Castille's election campaign for a position as Justice of the Supreme Court "stressed his record as Philadelphia's District Attorney." Specifically, he alleges that Justice Castille's campaign referenced his having "'put 45 people on death row,' one of whom is [defendant]." Defendant also quotes parts of news articles that purport to quote Justice Castille (recusal motion, ¶6). But news stories are not evidence of anything. *See New Haven Inclusion Cases*, 399 U.S. 392, 450 (1970) ("Both sides point to newspaper articles in support of their arguments. None of this is record evidence, and we do not consider it"); *Commonwealth v. Ngow*, 652 A.2d 305, 306 (Pa. 1995) (conviction reversed for insufficient evidence because proof "may not consist of what one hears on the news"; contrasting "evidence" with "mere conjecture based on anecdotes and newspaper articles"); *Commonwealth v. Collins*, 957 A.2d 257, 270 (Pa.2008) (affirming court's exclusion of testimony of witness who learned of the alleged fact "only from newspapers and from people in the community" and not from personal knowledge). Further, none of what defendant purports to quote (and in fact, not even the unverified text he purports to quote specifically mentions him) even arguably tends to establish prejudgment or bias in his own case. *Commonwealth v. Jones*, 663 A.2d at 145.

Defendant complains that his counsel has been criticized for acting in bad faith for making false statements in opinions denying similar recusal requests in the past (recusal motion, ¶9). But while Chief Justice Castille has at times used unambiguous language, most recently in his

concurring opinion in *Commonwealth v. Spotz*, 18 A.3d 244 (Pa. 2011), to describe the abusive tactics of the attorneys at the Federal Community Defender Organization (FCDO), including present defense counsel, there is nothing remotely improper about that. The majority opinion in that case was joined by the entire Court except Justice Eakin (who had recused) and Justice Saylor (who separately concurred), who in fact recommended referring FCDO counsel to the disciplinary board. What defendant's counsel apparently fails to appreciate is that each frivolous claim advanced by him is a facial violation of the Rules of Professional Conduct. *See* Pa.R.P.C. 3.1 (counsel "shall not bring or defend a proceeding, *or assert or controvert an issue therein*, unless there is a basis for doing so that is not frivolous") (emphasis added); *see also McCoy v. Court of Appeals of Wisconsin, District 1*, 486 U.S. 429, 436 (1988) ("Neither paid nor appointed counsel may ... consume the time and the energies of the court or the opposing party by advancing frivolous arguments"). Moreover, Justice McCaffery joined Chief Justice Castille's concurring opinion in *Spotz* its entirety; Justice Orie Melvin joined part II of that concurring opinion, which called for reforms in light of "rampant abuses in this case and other cases"; and Justice Saylor, as already noted, filed a separate concurring opinion reiterating his prior support for some of Chief Justice Castille's observations and recommending that the conduct of the FCDO attorneys be referred to the Disciplinary Board for investigation. In short, if condemnation of defense counsel's inappropriate tactics warranted recusal, Justice Eakin would be left alone to decide this case by himself.

But of course, defendant's argument is wrong. Given this Court's role as both a court of last result and the

ultimate arbiter of attorney discipline in Pennsylvania, it can and *must* police attorney-misconduct and admonish or formally discipline lawyers who serially or egregiously violate the Court's rules or the Rules of Professional Conduct. When the Court or its constituent members fulfill that duty, they are not – and cannot reasonably be construed – as acting out of personal animosity toward the attorneys they sanction. Instead, they are merely fulfilling the Court's constitutional mandate. Accordingly, no reasonable observer would believe the Justices of this Court to be incapable of fairly adjudicating the cases of attorneys whose misconduct they have noted and condemned. Indeed, any such false impression would easily be dispelled, as all of the members of this Court, including Chief Justice Castille, have voted to grant relief to clients of the FCDO in many cases.[2] It also bears noting that, since this is a Court of last resort, there would be no one to replace Chief Justice Castille if he were to recuse himself in cases involving the FCDO generally or Mr. Nolas in particular, an outcome that would do nothing to advance the interests of capital offenders or the administration of justice. *See Commonwealth v. Rainey*, 912 A.2d at 758, and the cases cited therein.

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2. *E.g.*, *Commonwealth v. Smith*, 995 A.2d 1143 (Pa. 2010); *Commonwealth v. Sattazahn*, 952 A.2d 640 (Pa. 2008); *Commonwealth v. Miller*, 951 A.2d 322 (Pa. 2008) (*per curiam*); *Commonwealth v. Williams*, 950 A.2d 294 (Pa. 2008); *Commonwealth v. Gibson*, 925 A.2d 167 (Pa. 2007); *Commonwealth v. Sneed*, 899 A.2d 1067 (Pa. 2006); *Commonwealth v. May*, 898 A.2d 559 (Pa. 2006); *Commonwealth v. Zook*, 887 A.2d 1218 (Pa. 2005); *Commonwealth v. Moore*, 860 A.2d 88 (Pa. 2004); *Commonwealth v. Chambers*, 807 A.2d 872 (Pa. 2002); *Commonwealth v. Strong*, 761 A.2d 1167 (Pa. 2000).

There also is no support for defendant's claim under the law of due process.[3] The United States Supreme Court recently revisited the legal landscape relating to the due process aspects of judicial recusal in *Caperton v. Massey Coal Co.*, 129 S. Ct. 2252 (2009). That case held that a state appellate judge was required, as a matter of federal due process, to recuse himself from an appeal involving a corporation whose president had contributed a substantial amount to his election campaign. The *Caperton* decision broke no new constitutional ground, and emphasized that the factual circumstances there were "extraordinary." 129 S.Ct. at 2265. *Compare, e.g., Tumey v. Ohio*, 273 U.S. 510 (1927) (judge, by virtue of fact that he also served as town mayor, received portion of fees and costs assessed to defendant in event of conviction); *Ward v. Monroeville*, 409 U.S. 57 (1972) (similar, except that fines imposed by mayor-judge went to town treasury); *In re Murchison*, 349 U.S. 133 (1955) (judge presided at hearing in case in which he previously had served as *de facto* grand juror); *Caperton*, 129 S.Ct. at 2257 (party to case had donated more than $3 million to judicial campaign of state justice who provided decisive vote reversing verdict of more

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3. Defendant's alternative argument, that recusal is somehow required by the Eighth Amendment, is legally incoherent. The Eighth Amendment, which prohibits "cruel and unsual punishment," by definition is only implicated by the infliction of punishment. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 837-38 (1994). Thus, it is unsurprising that there is no authority, and defendant does not cite any, supporting the conceit that recusal – particularly recusal of an *appellate* judge — is governed by the Eighth Amendment. Defendant's punishment was ordained 26 years ago by the jury; whatever decision Chief Justice Castille and the other members of the Court issue in this case will not itself constitute punishment.

than $50 million against donor). But defendant's counsel and Chief Justice Castille have no personal relationship. Their interactions have occurred entirely within the scope of their professional capacities. Thus, this case does not approach the "outer boundaries" patrolled by the Due Process Clause. *See Commonwealth v. Beasley*, 937 A.2d 379, 380-81 (Pa. 2007) (recusal opinion of Castille, J.) (rejecting recusal motion wherein defense counsel attempted to bootstrap due process claim to argument that recusal was required by the Code of Judicial Conduct); *Commonwealth v. Williams*, 732 A.2d 1167, 1174 (Pa. 1999) (rejecting claim that trial counsel provided ineffective assistance by not seeking then-Justice Castille's recusal on due process grounds). *See also Johnson v. Carroll*, 369 F.3d 253 (3d Cir. 2004) (explaining heightened requirements for claim that recusal was required on due process grounds); *Rollins v. Horn*, 2005 WL 1806504, *44 (E.D. Pa. Jul. 26, 2005) (unpublished) (rejecting argument that then-Justice Castille's denial of recusal motion resulted in due process violation).

There is nothing new in the FCDO's latest in a series of petitions seeking the recusal of Chief Justice Castille. Rather, the recusal motion – much like defendant's untimely third PCRA petition – only recycles old claims that have already failed in the past. It should be denied.

Respectfully submitted,

Hugh J. Burns, Jr.
Chief, Appeals Unit

APPENDIX K — MOTION TO RECUSE CHIEF JUSTICE CASTILLE, DATED OCTOBER 1, 2012

SUPREME COURT OF PENNSYLVANIA

No. 163 EM 2012

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

TERRANCE WILLIAMS,

Respondent.

RESPONDENT'S MOTION TO RECUSE CHIEF JUSTICE CASTILLE

Respondent Terrance Williams, through counsel, respectfully moves for recusal of Chief Justice Ronald D. Castille from the instant proceedings. In support of this motion, Mr. Williams states as follows:[1]

1. Chief Justice Castille was the District Attorney for Philadelphia from January 1, 1986 until March 12, 1991.

2. Chief Justice Castille *personally authorized his Office to seek the death penalty in this case,* hand-writing

1. All emphasis herein is supplied unless otherwise indicated.

the following on a memorandum to Mark Gottlieb, Chief of his Office's Homicide Unit, which was introduced as an exhibit during the recent PCRA evidentiary hearing:

> Mark,
> Approved to proceed on the Death Penalty.
> */s/* Ronald D. Castille

PCRA Evidentiary Hearing Exhibit P-1, Memorandum to Mark Gottlieb, Chief, Homicide Unit, page 2 (dated 11/21/86) (appended as exhibit A); see also NT *9120112* (a.m.) at 11 (trial prosecutor Andrea Foulkes identifies Chief Justice Castille's signature on this document as authorizing the approval to proceed on the death penalty).

3. Chief Justice Castille was the District Attorney throughout the trial, capital sentencing, post-trial, and direct appeal proceedings in this case.

4. On direct appeal in Mr. Williams' case, the Philadelphia District Attorney's Office filed a Brief in the Pennsylvania Supreme Court, asking the Court to affirm Mr. Williams' convictions and death sentence. Then-District Attorney Castille is identified as one of the listed counsel for the Commonwealth on the cover and signature page of the Brief (appended as exhibit B).

5. In the current PCRA proceedings, evidence was introduced that, on June 23, 1988, trial prosecutor Foulkes wrote a letter to the Pennsylvania Board of Probation and Parole on behalf of Marc Draper, a key Commonwealth witness at Mr. Williams' trial. See PCRA

Evidentiary Hearing Exhibit P-15 (appended as exhibit C). The letter asks the Board to "consider [Mr. Draper's] cooperation ... when determining his eligibility for parole or commutation," and notes that this recommendation from the prosecutor was a "benefit or promise conveyed to" Mr. Draper in exchange for his testimony against Mr. Williams. *Id.* at 2. The trial prosecutor testified at the recent PCRA hearing that this promise to the Commonwealth's witness was not disclosed to the defense at trial. In her PCRA ruling, Court of Common Pleas Judge Sarmina cited this undisclosed inducement, among several other items of evidence, as evidence demonstrating that the trial prosecutor suppressed exculpatory evidence, played "fast and loose" with the truth, "had no problem disregarding her ethical obligations," and "took unfair measures to win." NT 9/28112 at 37, 39 45. Although Chief Justice Castille is not the signatory of the letter, the letter is written on the official letterhead of the Philadelphia District Attorney's Office and the sole name on the letterhead is "Ronald D. Castille, District Attorney." If for no other reason than the appearance of impropriety, Respondent respectfully suggests that recusal is appropriate for this reason as well.

6. In 1993, Chief Justice Castille campaigned for a position as a Justice on the Pennsylvania Supreme Court. His election campaign stressed his record as Philadelphia's District Attorney and, in particular, emphasized then-District Attorney Castille's pursuit of capital punishment and that, as District Attorney, he "put 45 people on death row," one of whom is Terrance Williams, Respondent on the pending Commonwealth motion to vacate the stay of execution. Examples include:

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* "Castille had campaigned as the law-and-order candidate, airing television commercials portraying [his opponent] as being soft on crime." Lisa Brennan, "Republicans Win Court Seats," LEGAL INTELLIGENCER (Nov. 4, 1993) (available on Westlaw, 11/4/1993 TLI l);

* "Castille, a former Philadelphia district attorney, had campaigned as the self-proclaimed law-and-order candidate, airing television commercials portraying his Democratic opponent as soft on crime." Associated Press, "Castille Wins Top Court Seat," ALLENTOWN MORNING CALL (Nov. 3, 1993) (available on Westlaw, 1993 WLNR 1864290);

* "Castille ... campaigned as the tough-as-nails scourge of criminals .... Castille's career as Philadelphia's district attorney, where he built a reputation as a law-and-order crime buster, thrust him in the public eye." Katharine Seelye, "Castille Defeats Nigro for Seat on Supreme Court," PHILADELPHIA INQUIRER (Nov. 3, 1993) (available on Westlaw, 1993 WLNR 1995447);

* "Castille [ran] a law-and-order campaign, touting his 45 death-penalty convictions and saying [his opponent] was soft on crime .... 'My campaign was basically that I've spent 20 years in law enforcement as a prosecutor, and the citizens want somebody who's tough on crime. My record's

been just that,' Castille said early this morning." Tim Reeves, "Castille Leads GOP Sweep of Courts," PITTSBURGH POST-GAZETTE (Nov. 3, 1993) (available on Westlaw, 1993 WLNR 2163040);

* "[W]hen he is asked why he wants to serve on the Supreme Court, what qualifies him, why voters should support him, he starts with his experience in Vietnam, works up to his record as Philadelphia district attorney and caps his pitch by declaring that he put 45 murderers on death row. Because he served in combat and as a prosecutor, he says, he is a proven law-and-order guy, tough on crime, eats nails for breakfast." "Castille used his first television ads to attack [his opponent], saying [his opponent] was lenient on drug dealers .... Castille's TV spots conclude: 'If you are looking for a law-and-order guy- Ron Castille. He put 45 murderers on death row and has been endorsed by the over 36,000 professional police officers in Pennsylvania.'" Katharine Seelye, "Castille Emphasizes Law-and-Order Image," PHILADELPHIA INQUIRER (Oct. 21, 1993) (available on Westlaw, 1993 WLNR 1992136);

* "Castille ... hopes a law-and-order message, coupled with name recognition in southeastern Pennsylvania, will help him win .... 'When I start talking about court reform, people's eyes glaze over,' he said. 'When I tell them about (my)

sending criminals to death row or how I fought the Mafia in Philadelphia, then they're interested.'" Frank Reeves, "Castille Preaches Law-and-Order Message to Voters, PITTSBURGH POST-GAZETTE (Oct. 18, 1993) (available on Westlaw, 1993 WLNR 2134084);

* "Castille and his prosecutors sent 45 people to death row during their tenure, accounting for more than a quarter of the state's death row population. Castille wears the statistic as a badge. And he is running for the high court as if it were exclusively the state's chief criminal court rather than a forum for a broad range of legal issues . ... Castille talks about bringing a prosecutor's perspective to the bench." Tim Reeves, "High Court Hopefuls Pressing for Change," PITTSBURGH POST-GAZETTE (Oct. 17, 1993) (available on Westlaw, 1993 WLNR 2117584);

* "Castille's [TV] ad portrays [his opponent] as soft on crime and offers Castille, a former Philadelphia district attorney, as the 'law-and-order' alternative .... The ad ... says Castille has put 45 people on death row and has received the endorsement of more than 36,000 police officers in the state." "Nigro, Castille Begin TV Campaign," LEGAL INTELLIGENCER (Oct. 14, 1993) (available on Westlaw, 10/14/1993 TLI 3); Katharine Seelye, "Judicial Candidates Begin Courting the TV Audience," PHILADELPHIA

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INQUIRER (Oct. 12, 1993) (available on Westlaw, 1993 WLNR 1991534) (same);

* "Some candidates ... skated perilously close to saying how they might be expected to rule on issues that could come before them as judge. Take, for example, Supreme Court Justice-elect Ron Castille - who, while pursuing a job requiring him to hear death-penalty appeals, bragged that he sent 45 people to death row when he was a prosecutor." Lynn Marks & Ellen Kaplan, "Disorder in the Courts," PITTSBURGH POST-GAZETTE (Nov. 14, 1993) (available on Westlaw, 1993 WLNR 2150772);

* Candidates "Castille, Nigro and Surrick are aware that special interest groups capable of giving money to control votes would love to hear their positions on gun control, abortion, the death penalty or any hot issue of the day. Under the current [legal] restrictions, Castille says if candidates take positions then they'll have to recuse themselves from any decisions in those cases. 'There's really no solution to it,' Castille says. 'You ask people to vote for you, they want to know where you stand on the death penalty. *I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get the hint.*'" Lisa Brennan, "State Voters Must Choose Next Supreme Court Member," LEGAL INTELLIGENCER (Oct. 28, 1993) (available on Westlaw, 10/28/1993 TLI 1).

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7. Chief Justice Castille was elected and assumed his position on the Pennsylvania Supreme Court in January 1994.

8. Since Chief Justice Castille assumed the Bench, undersigned counsel's office has sought Chief Justice Castille's recusal from several Philadelphia capital PCRA appeals, arguing that recusal was appropriate because of Chief Justice Castille's role as Philadelphia's District Attorney during some earlier stage of the case. Chief Justice Castille denied recusal in those cases. *See,e.g.*, *Commonwealth v. Porter*, 35 A.3d 4, 29 (Pa. 2012) (recusal opinion of Castille, C.J.); *Commonwealth v. Beasley*, 937 A.2d 379 (Pa. 2007) (recusal opinion of Castille, J.); *Commonwealth v. Rainey*, 912 A.2d 755 (Pa. 2006) (recusal opinion of Castille, J.); *Commonwealth v. Jones*, 663 A.2d 142 (Pa. 1995) (recusal opinion of Castille, J.); *Commonwealth v. Williams*, 732 A.2d 1167, 1174 (Pa. 1999).

9. Chief Justice Castille's most recent opinions denying recusal motions based in part on his earlier role as District Attorney suggest and/or expressly state that undersigned counsel's office is acting in bad faith by seeking Chief Justice Castille' s recusal. *See, e.g.*, *Rainey*, 912 A.2d at 759 (accusing counsel of"reckless disregard" and writing "scurrilously"); *id.* at 760 (stating that counsel's "unsupported 'factual' averrnents are utterly false ... "); *id.* at 760 n.3 ("It bears noting, given the nature of the instant allegations, that the attorney's oath of office includes a pledge to 'use no falsehood.' ... In addition, the Rules of Professional Conduct prohibit

lawyers from knowingly making a false statement of material fact or law to a tribunal.. .. "); *id.* at 761 ("I certainly hope that the Chief Defender did not personally review and approve as a 'policy' matter the falsehoods that are the basis for [counsel's] argument contained herein."); *id.* at 761 (stating that counsel's "allegations are as bereft of factual support as they are distressingly unmindful of his sworn duties as a lawyer and officer of this Court"); *id.* at 761 ("reckless nature of [counsel's] baseless allegation"); Beasley, 937 A.2d at 381 (accusing counsel of "false statements," "mischaracterizations" and "ethical lapses"); *id.* at 3 82 (asserting that counsel made "scandalous misrepresentations in Rainey"); *id.* at 382 (asserting that counsel's actions in Rainey were "unethical representation"); *id.* at 383 (suggesting that counsel "betray[ed] contempt for ethical standards" and "contempt for [the] court"); *id.* at 383 (asserting that counsel is in "dogged pursuit of a poor reputation"); Porter, 35 A3d at 33 (rejecting counsel's "repetitious complaint that my former position as the elected District Attorney of Philadelphia County requires my recusal" for reasons stated in "multiple prior opinions" (citing Beasley)); *id.* at 34 (asserting that counsel's requests for Chief Justice Castille's recusal reflect counsel's "perverse worldview"); *id.* at 34 (suggesting that counsel's recusal motions violate "professional ethical obligations").

ARGUMENT

10. Chief Justice Castille's recusal from this matter is appropriate under Pennsylvania law, the Due Process Clause of the Fourteenth Amendment to the United States

Constitution, and the Eighth Amendment to the United States Constitution.

11. Moreover, should Chief Justice Castille decline to recuse himself, the Due Process Clause and the Eighth Amendment require that the recusal issue be considered and decided by the full Court.

I. DUE PROCESS AND THE EIGHTH AMENDMENT REQUIRE CHIEF JUSTICE CASTILLE'S RECUSAL

12. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico*, Inc., 446 U.S. 238, 242 (1980); *accord In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). This due process right "has been jealously guarded by [the United States Supreme] Court" because it "preserves both the appearance and reality of fairness, generating the feeling, so important to a popular government, that justice has been done." *Marshall*, 446 U.S. at 242 (citation and internal quotation marks omitted). And this due process requirement takes on even greater significance in a capital case, because of the Eighth Amendment's heightened due process requirements. *E.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

13. A fair, "impartial and disinterested tribunal," as required by the Eighth and Fourteenth Amendments, requires not just "an absence of actual bias" - there must

not be "even the probability of unfairness," and "'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). As the United States Supreme Court most recently stated in *Caperton v. Massey Coal Co.*, 556 U.S. 868 (2009): "Under our precedents there are *objective standards* that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* at 872 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The Supreme Court further explained:

> The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

Caperton, 556 U.S. at 883.

14. These "objective standards" require recusal when the situation "offer[s] a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused." *Caperton*, 556 U.S. at 878 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)); *id.* at 879 (same).

15. While the "possible temptation" standard "cannot be defined with precision," *Murchison*, 349 U.S. at 136; *Caperton*, 556 U.S. at 879, it applies here, where Chief Justice Castille was the District Attorney responsible for prosecuting Mr. Williams at trial and on direct appeal; where Chief Justice Castille in a handwritten note *personally authorized* his Office to seek the death penalty for Mr. Williams; where Chief Justice Castille's name appears as counsel for the Commonwealth on the direct appeal brief seeking affirmance of Mr. Williams' convictions and death sentence; where the claims presented in this case include claims that the District Attorney's Office, then headed by Chief Justice Castille, violated due process under Brady and related cases by suppressing exculpatory information and presenting false and misleading information to the jury; where Chief Justice Castille' s name appears as counsel for the Commonwealth on a letter that is part the evidence litigated in the Court of Common Pleas in this case; where Chief Justice Castille's campaign for judicial office highlighted his obtaining the death penalty in a number of capital cases, including Mr. Williams' case; and where Chief Justice Castille appears to have expressed hostility to undersigned counsel's office.

16. Respondent respectfully submits that, considering "all the circumstances of this case, due process requires recusal." *Caperton*, 556 U.S. at 872. Moreover, consideration of some of the circumstances individually highlights why due process requires Chief Justice Castille's recusal.

17. The Supreme Court's finding of a due process violation in *Murchison* supports Respondent's argument that due process does not allow Chief Justice Castille's participation as a judge in a case where he was the District Attorney who was responsible for Mr. Williams' prosecution throughout trial and direct appeal, and personally authorized his Office to seek the death penalty.

18. In *Murchison*, the judge who presided at trial had conducted "'one man grand jury' proceedings" that resulted in the defendant's indictment. 349 U.S. at 136. The Supreme Court held:

> Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

Id. at 137. *See also Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) (describing *Murchison's* holding that the ".judge violated due process by sitting in the criminal trial of defendant whom he had indicted").

19. Here, should Chief Justice Castille participate, the due process violation will be even more clear than it was in *Murchison*. While the *Murchison* judge returned the indictment while acting as a *judge* and, thus, did "not likely have all the zeal of a prosecutor," *id.* at 137, then-District Attorney Castille *was the prosecutor who personally authorized his Office to seek the death penalty* in Terrance Williams' case. Due process will thus be violated if Chief Justice Castille now assumes the role of judge. And the due process requirement for Chief Justice Castille's recusal is even more applicable because the issues in this case, as the Court of Common Pleas has found, involve the violation of Mr. Williams' due process rights (by suppressing exculpatory information and presenting misleading information to the jury) by the District Attorney's Office that Chief Justice Castille headed at that time. If ever there was a case that "offer[s] a possible temptation to the average man as a judge ... not to hold the balance nice, clear and true between the State and the accused," *Caperton*, 556 U.S. at 878, this is it.

20. The above-described reports of Chief Justice Castille's judicial election campaign further highlight why it would violate due process for Chief Justice Castille to sit in judgment here. The *Caperton* decision made clear that judicial elections can create circumstances under which due process requires judicial recusal. Former United States Supreme Court Justice John Paul Stevens has stated: "A campaign promise to 'be tough on crime,' or to 'enforce the death penalty,' is evidence of bias that should disqualify a candidate from sitting in criminal cases." John Paul Stevens, *Opening Assembly Address, AB.A.*

Ann. Meeting, 12 ST. JOHN'S J. LEGAL COMMENT. 21, 30-31 (1996). *See also* Keith Swisher, *Pro-Prosecution Judges: "Tough on Crime," Soft on Strategy, Ripe for Disqualification*, 52 Ariz. L. Rev. 317, 319 (2002) (under due process analysis required by *Caperton*, "tough-on-crime elective judges should recuse themselves from all criminal cases"). But such a sweeping rule is not necessary here. Chief Justice Castille's campaign was not just "toughon-crime" or pro-death penalty, it was based in part on his record as District Attorney of putting people on death row, *one of whom is Mr. Williams.* Under these circumstances, at least, due process counsels Chief Justice Castille's recusal.

21. Chief Justice Castille' s antagonistic attitude toward undersigned counsel's office, as evidenced by statements in his opinions denying prior recusal motions, also supports this motion for recusal on due process grounds. *See, e.g.*, *Caperton*, 556 U.S. at 881 (due process requires recusal when judge "becomes 'embroiled in a running, bitter controversy" "with litigant (quoting *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971)));*Commonwealth v. Dougherty.* 18 A.3d 1095, 1096 (Pa. 2011) (Baer, J., concurring) (explaining that when judge "chastised an assistant district attorney who requested her recusal ... , this Court determined that such remarks increased the appearance of impropriety, and, indeed, necessitated the reversal of the judge's refusal to recuse" (citing *Commonwealth v. White*, 910 A.2d 648 (Pa. 2006)); *id.* at 1097 ("to attack counsel personally for requesting recusal, when the law requires such motions to be put forth before the judge whose actions are in question in

the first instance, is obviously inappropriate"); *Offutt v. United States*, 348 U.S. 11, 17 n.3 (1954) (recusal required where judge criticized counsel as giving a "disgraceful and disreputable performance on the part of a lawyer who is unworthy of being a member of the profession; and I, as a member of the legal profession, blush that we should have such a specimen in our midst"); *Fairley v. Andrews*, 423 F.Supp.2d 800, 821 (N.D. Ill. 2006) (recusal required where judge made comments that could have been interpreted as prejudgment of the case against defendants, "especially in the wider context of the Court's negative interactions with Defendants' counsel"); *United States v. Meyerson*, 677 F.Supp. 1309, 1315 (S.D.N.Y. 1988) (judge recused self because judge "resent[ed] unsupported assertions" and "tactics" of counsel); *Marshall v. Georgia Pac. Corp.*, 484 F.Supp. 629, 631 (E.D. Ark. 1980) (recusal where reasonable observer "could assume that the court would view [statements by counsel] with considerable displeasure").

22. For all of the above-stated reasons, the Due Process Clause and the heightened due process requirements of the Eighth Amendment make Chief Justice Castille's recusal appropriate in this case.

II. PENNSYLVANIA LAW REQUIRES CHIEF JUSTICE CASTILLE'S RECUSAL

23. Pennsylvania's Code of Judicial Conduct requires recusal when a judge's "impartiality might reasonably be questioned." *Id.*, Canon 3(C)(l). *See also Joseph v. Scranton Times*, 987 A.2d 633, 634 (Pa. 2009) (per curiam)

("appearance of impropriety" requiring recusal where "there are factors or circumstances that may reasonably question the jurist's impartiality in the matter"; "There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings. A trial judge should not only avoid impropriety but must also avoid the appearance of impropriety."). For the reasons already stated, Chief Justice Castille's "impartiality might reasonably be questioned" in this case; thus, recusal is required under Pennsylvania law.

24. Moreover, Pennsylvania's Code of Judicial Conduct specifically identifies the following as an example of when a judge's "impartiality might reasonably be questioned" and, thus, when his or her recusal is required - when the judge "served as a lawyer in the matter in controversy." *Id.*, Canon 3(C)(l)(b). In *Commonwealth ex rel. Allen v. Rundle*, 189 A.2d261, 262 (Pa. 1963), the Court held that a judge who was the district attorney at the time the defendant was indicted must recuse himself from defendant's post-conviction proceedings. The same is true for Chief Justice Castille here, since he was the District Attorney throughout the trial and direct appeal proceedings, and personally authorized seeking death. *See also United States v. Amerine*, 411 F.2d 1130, 1134 (6th Cir. 1969) (applying similar language from 28 U.S.C. § 455 (1964); recusal of judge who was United States Attorney for the district in which defendant was tried at the time when complaints were issued against defendant "is not a matter for the exercise of [the judge's] discretion but is unconditional and absolute"); *United States v. Vasilick*,

160 F.2d 631, 632 (3d Cir. 1947) (same for judge who was United States Attorney when indictment was returned against defendant).

25. In Jones, Chief Justice Castille stated that he was exempted from Canon 3(C)(l)(b) by the Commentary thereto: "A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection." *Jones*, 663 A.2d at 146 (quoting Commentary to Canon 3(C)(l)(b)). But Chief Justice Castille's role as the Commonwealth's lawyer in this case did not arise through mere "association with other lawyers" in the District Attorney's Office. Instead, as the District Attorney himself, he was charged by law with representing the Commonwealth's interests in Mr. Williams' case. While one might argue that one *assistant* district attorney "does not necessarily have an association with other" *assistant* district attorneys in the same Office, it cannot reasonably be asserted that *the* District Attorney does not "have an association" with the lawyers under his command. The District Attorney is not merely a "lawyer in a governmental agency" - he is the *head* of that agency and the actions of that agency are his responsibility *as a matter of law. See* 16 Pa.C.S. § 1420 ("the district attorney may appoint such number of assistants, learned in the law, *to assist him* in the discharge of his duties"); Commonwealth ex rel. *Specter v. Bauer*, 261 A.2d 573, 57 5 (Pa. 1970) ("district attorneys in this Commonwealth have the power - and the duty- to represent the Commonwealth's interests in the enforcement of its criminal laws"); *id.* at 576 (district attorney is the "sole public official charged with the legal

responsibility of conducting in court all criminal and other prosecutions, in the name of the Commonwealth" (internal quotation marks omitted)); *Commonwealth v. Malloy*, 450 A.2d 689, 691-92 (Pa.Super. 1982) ("the district attorney is charged with the responsibility for the investigation and prosecution of any complaint which he approves"; "the district attorney's function is to represent the Commonwealth in criminal prosecutions. In the capacity as the Commonwealth's attorney, the district attorney has traditionally fulfilled the obligation of investigation and prosecution of crime by initially evaluating complaints to determine whether a charge should be brought against a suspect. 'A District Attorney has a general and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case.'").

III. THIS CASE IS DIFFERENT FROM PRIOR CASES IN WHICH CHIEF JUSTICE CASTILLE DENIED RECUSAL MOTIONS

26. In prior cases where Chief Justice Castille denied recusal motions grounded in part upon his former position as Philadelphia's District Attorney, Chief Justice Castille relied upon the movant's inability to provide evidence that Chief Justice Castille was "personally involved" in the movant's prosecution. *See,e.g., Rainey*, 912 A.2d at 757 ("To the best of my knowledge and recollection, I was not personally involved in any pre-trial investigation of appellant [or] the charging decisions that were made in his case .... [Counsel] has pointed to nothing in the record

that demonstrates otherwise."); *Porter*, 35 A.3d at 33 (rejecting counsel's "repetitious complaint that my former position as the elected District Attorney of Philadelphia County requires my recusal, even though I had no actual involvement in appellant Porter's trial or direct appeal"); Beasley, 937 A.2d at 381 ("[T]o the best of my knowledge and recollection, I was not personally involved .... [Counsel] has pointed to nothing in the record that demonstrates otherwise.").

27. In this case, there is specific evidence of Chief Justice Castille's direct, personal involvement in this case - then-District Attorney Castille's *handwritten notation personally authorized his Office to seek death.* Thus, if personal involvement is required, it is established here.

28. In any event, the question of "personal involvement" is not dispositive under the objective standards that govern recusal matters. Even absent proof of "personal involvement," recusal would be required here, as a matter of Fourteenth Amendment Due Process and Eighth Amendment law, and under Pennsylvania law, for all of the reasons stated herein.

IV. IF CHIEF JUSTICE CASTILLE DECLINES TO RECUSE HIMSELF, THIS MATTER SHOULD BE REFERRED TO THE FULL COURT

29. In denying prior recusal motions in capital PCRA cases, Chief Justice Castille stated that, "[u]nder the existing practice of this Court, recusal has been a matter of individual discretion or conscience and only the jurist

being asked to recuse himself or herself may properly respond to such a request," *Jones*, 663 A.2dat 143 (citing *Commonwealth v. O'Shea*, 567 A.2d 1023, 1034 (Pa. 1989); *In re Crawford's Estate*, 160 A. 585, 587 (Pa. 1932)), and denied requests that the recusal motion be referred to the full court, *Porter*, 35 A.3d at 34.

30. Respondent Williams respectfully submits that this practice is inappropriate in light of the *objective* standards for recusal mandated by the Due Process Clause, *e.g.*, *Caperton*, 556 U.S. at 872 ("there are *objective standards* that require recusal when 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable'" (quoting *Withrow*, 4 21 U.S. at 4 7), and Pennsylvania's Code of Judicial Conduct, *e.g.*, Canon 3 (C)(l) (recusal required when "impartiality might *reasonably* be questioned").

31. To be sure, it is appropriate for a recusal motion to *first* be considered by the Justice to whom it is directed, since only that Justice can know ifthere are *subjective* factors that require his or her recusal. But that subjective inquiry is "just one step in the judicial process" of considering a recusal motion - if a Justice makes the subjective determination that he or she is not biased, the recusal inquiry must proceed to the *objective* inquiry that is appropriate under Due Process, the Eighth Amendment and Pennsylvania law. *Caperton*, 556 U.S. at 886 ("Justice Benjamin did undertake an extensive search for actual bias. But, as we have indicated, that is just one step in the judicial process; objective standards may also require recusal whether or not actual bias exists or can be

proved."). As the United States Supreme Court recently reiterated:

> The judge's own inquiry into actual bias ... is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.

Caperton, 556 U.S. at 883.

32. As to the *objective* recusal inquiry, the Justice whose recusal is sought is no better able to decide, and arguably is less able, than the rest of the Court. Indeed, due process *requires* that the full Court decide the due process-based recusal issue, just as the full Court would decide any other Constitutional issue presented by a litigant.

33. Accordingly, should Chief Justice Castille decide that he is not inclined to recuse himself, the matter should be referred to the full Court for decision under the objective standards mandated by Due Process, the Eighth Amendment and Pennsylvania law.

34. At the very least, the Court should order full briefing and argument on this issue, which courts have recognized to be one of great importance. *See State*

v. Allen, 778 N.W.2d 863, 871-73, 880-83 (Wis. 2010) (plurality opinion) (calling for briefing and argument, in light of *Caperton*, on question of whether due process requires full Court review of single Justice's recusal decision); *U.S. Fidelity Ins. v. Catastrophic Claims*, 773 N.W.2d 243, 246-47 & n.12 (Mich. 2009) (opinion of Corrigan, J.) (same, noting that "former Michigan State Supreme Court Chief Justice Clifford Taylor [has stated] that *Caperton* 'has to mean that the challenged justice can't make the recusal decision alone'"); *id.* at 250 (calling for briefing and argument on question: "Does this Court's historical recusal practice - which permits each justice to decide motions for his or her recusal ... - comport with the Caperton Court's requirement for objective standards?"); *Fieger v. Gromek*, 373 Fed. Appx. 567, 572 (6th Cir. 2010) (holding that due process challenge to Michigan Supreme Court's practice of single justice consideration of recusal motions was mooted by that Court's adoption of the following "new disqualification rule": "In the Supreme Court, if a justice's participation in a case is challenged by a written motion ... , the challenged justice shall decide the issue and publish his or her reasons about whether to participate. If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification. The Court shall issue a written order containing a statement of reasons for its grant or denial of the motion for disqualification. Any concurring or dissenting statements shall be in writing.").

Appendix K

CONCLUSION AND PRAYER FOR RELIEF

For the reasons stated, Respondent respectfully prays:

1. that Chief Justice Castille recuse himself;

2. that, should Chief Justice Castille decline to recuse himself, this motion be referred to the full Court for decision; and that the full Court direct Chief Justice Castille's recusal.

Respectfully submitted,

LEIGH M. SKIPPER
Chief Federal Defender

BY:

/s
Shawn Nolan
PA Bar No. 56535
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Assistant Defenders
Federal Community Defender Office
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APPENDIX L — EXCERPTS OF BRIEF FOR APPELLEE IN THE SUPREME COURT OF PENNSYLVANIA

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 98
E.D. APPEAL DOCKET 1987

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

TERRANCE WILLIAMS,

Appellant.

BRIEF FOR APPELLEE

Appeal from the Judgment of Sentence of the Court of Common Pleas, Trial Division, Criminal Section, of Philadelphia County, as of Information Nos. 2362-2367, August Term, 1984.

/s/_____
HUGH J. BURNS, JR.
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney

Appendix L

WILLIAM G. CHADWICK, JR.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney

1421 Arch Street
Philadelphia, PA 19102

***

Appendix L

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests this Court to affirm the judgments of sentence.

Respectfully submitted,

/s/_____
HUGH J. BURNS, JR.
Assistant District Attorney
RONALD EISENBERG
Chief, Appeals Unit
GAELE McLAUGHLIN BARTHOLD
Deputy District Attorney
WILLIAM G. CHADWICK, JR.
First Assistant District Attorney
RONALD D. CASTILLE
District Attorney

APPENDIX M — LETTER FROM THE DISTRICT ATTORNEY'S OFFICE, DATED JUNE 23, 1988

DISTRICT ATTORNEY'S OFFICE
1421 Arch Street
Philadelphia, Pennsylvania 19102

June 23, 1988

Ronald D. Castille
District Attorney

Pa. Board of Probation and Parole
P.O. Box 1661
3010 N. Front Street
Harrisburg, Pennsylvania 17120

Re: *Inmate Marc Draper*

To Whom It May Concern:

At the request of the family of the above-named inmate, I am submitting the following information to them with instructions to forward it to you if and when this prisoner becomes eligible for parole or commutation of sentence.

Marc Draper was the co-defendant of Terrance Williams and, with Williams, conspired and acted to abduct, rob and beat to death 56 year old Amos Norwood, inside the Ivy Hill cemetery in the Mt. Airy section of Philadelphia. After tying the victim with his own clothes and beating him with car tools, the co-defendants took his money, credit cards and car, obtained more money and jewelry with the stolen goods in Atlantic City and

Philadelphia. Their spree was ended when credit card calls were traced by police to a third man who assisted the killers in obtained these credit card benefits.

Mr. Draper was arrested in his home and Williams fled the jurisdiction upon issuance of warrants. On the day of his arrest, Mr. Draper completely and thoroughly confessed his participation in this hideous crime without any promises or benefits offered to him. In addition, he volunteered additional information about his co-defendant's responsibility for the murder of 53 year old Herbert Hamilton in West Philadelphia six months earlier, which led to the arrest of Williams on that previously unsolved case. Draper offered to cooperated fully with the investigations and to testify truthfully in the prosecution of Williams in both homicide cases, resulting in Williams' conviction in the earlier killing of murder in the third degree (William's defense was that the killing was provoked by homosexual advances of the victim), and a verdict of murder in the first degree with the penalty of death by the jury in the Norwood case. In addition, Draper agreed to plead guilty to murder in the second degree, knowing that it brought a mandatory life sentence, without any promise of leniency or early release.

Although the heinous nature of the underlying crime cannot be minimized in any way, Mr. Draper has attempted to compensate significantly for his role in this matter. While it is true that he has benefitted by avoiding the death penalty for himself, I was well aware that during the pendency of prosecutions against Williams, Mr. Draper was visited regularly in Holmesburg prison by Williams himself, at the gates of Draper's protective custody area,

and by friends of Williams inside Draper's cell. Thus, Mr. Draper's security in prison was never certain, yet he continued without complaint in his cooperation with authorities to see that justice was served in all matters in which he had information or connection.

I never had any reason to doubt Mr. Draper's veracity and he never declined to answer the most difficult questions about his own culpability. Williams sent Mr. Draper letters in prison with alternative stories to feed the authorities and the court about their criminal activities. Mr. Draper passed that correspondence on to his father, a Philadelphia police officer, with instructions to give them to the prosecutor in preparation for trial. Those letters, in addition to his oral testimony, established a compelling case against Williams who had a frightening history for violent crimes.

Therefore, it is proper for you to consider the cooperation of this inmate when determining his eligibility for parole or commutation at some future date. That I provide you with the particulars of Mr. Draper's cooperation was the only benefit or promise conveyed to him in exchange for his complete truthful cooperation. I hope this information will be useful in your evaluations.

Yours very truly,

s/_____
ANDREA G. FOULKES
Assistant District Attorney
Homicide Unit

bbc: Mr. George Draper

APPENDIX N — ORDER OF THE COURT OF COMMON PLEAS - PHILADELPHIA COUNTY, GRANTING PENALTY-PHASE RELIEF, DATED SEPTEMBER 28, 2012

PHILADELPHIA COURT OF COMMON PLEAS
CRIMINAL TRIAL DIVISION

CP-51-CR-0823621-1984

COMMONWEALTH

v.

TERRANCE WILLIAMS

Sarmina, J.

ORDER

AND NOW, this 28th day of September, 2012, it is ORDERED that the stay of execution is GRANTED and a new penalty phase is ORDERED.

BY THE COURT:

/s/_____
M. Teresa Sarmina

APPENDIX O — TRANSCRIPT OF PROCEEDINGS OF COURT OF COMMON PLEAS - PHILADELPHIA COUNTY, DATED SEPTEMBER 28, 2012

[1]IN THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA COURT OF COMMON PLEAS - PHILADELPHIA COUNTY, CRIMINAL TRIAL DIVISION

CP-51-CR-0823621-1984
CP-51-CR-0907971-1984

COMMONWEALTH

v.

TERRANCE WILLIAMS

FRIDAY, 28 SEPTEMBER 2012
Courtroom 507
Criminal Justice Center
Philadelphia, Pennsylvania

BEFORE THE HONORABLE M. TERESA SARMINA, J.

***

[4]THE COURT: The court reporter has asked that everyone identify themselves for the record.

MR. NOLAS: Billy Nolas, Your Honor, on behalf of the Petitioner.

MR. MONTROY: Eric Montroy, Your Honor, on behalf of the Petitioner.

MR. NOLAN: Shawn Nolan, Your Honor, on behalf of Petitioner.

MS. GIVENS: Jennifer Givens, Your Honor, on behalf of Petitioner.

MR. EISENBERG: Ronald Eisenberg for the Commonwealth.

MS. GODFREY: Robin Godfrey on behalf the Commonwealth.

MS. NAHLER: Kari Nahler on behalf of the Commonwealth.

THE COURT: Thank you. Under our system of law, there are safeguards to guard against convictions or sentences that may be proper for a number of reasons.

The first level of review of a conviction and sentence is afforded a defendant through a direct appeal. At that [5]time, trial court error and missteps by the prosecutor, including prosecutorial misconduct, based on things that can be gleaned from the record of the trial are reviewed. After that stage of the proceedings, which can go as far as the U.S. Supreme Court, there is the opportunity for what is called a collateral challenge to the conviction, including that prior counsel rendered ineffective assistance.

This is a very technical area, and in Pennsylvania is governed by the Post Conviction Relief Act, also known as the PCRA.

Under the PCRA, all petitions for relief must be filed within one year of judgment becoming final.

Judgment of sentence becomes final at the conclusion for direct review.

This Court was assigned the petition of Terrance Williams for Post-Conviction Relief and for a stay of execution.

A review of that petition made it obvious that the judgment of sentence had become final decades ago.

[6] This Court made the decision to hear evidence from two witnesses in this case, the trial prosecutor regarding petitioner's two homicide trials, Miss Andrea Foulkes, as well as the Commonwealth's principal witness at both of those trials, Marc Draper.

Due to the time limitations involved, and due to the duty of the Court to make credibility determinations concerning the testimony to be provided, this Court made the unusual decision to direct that neither side would be permitted to speak to or prep the witnesses prior to them testifying.

The Court retrieved from Ms. Foulkes a CD that had earlier been provided to her by the District Attorney's

Office since it contained much more than what was necessary for her to review the decisions she made at the two trials.

It was apparent from her testimony here that she reviewed much more than just what occurred at trial, and she conceded as much. And I imply no wrongdoing on her part for having done that. She received that CD before the Court ever knew it [7] had been provided to her by the District Attorney's Office.

The Court also precluded the defense from providing to Mr. Draper the affidavit he had most recently provided to them, notwithstanding that they had told him they would send it. He had not had the opportunity to review any of his trial testimony before testifying here.

The Court also directed that Ms. Foulkes' trial files be brought to the Court's chambers, and that both sides would be permitted to review them there and mark any documents that they wanted to use in their examination of the witnesses.

Ms. Foulkes also had, and took, the opportunity to go through her files and to copy whatever she wanted.

Both sides were then given a copy of whatever she had copied.

Over this past weekend the Court also directed that the two Homicide files of the Philadelphia Police Department's Homicide Unit from 1984 were to be brought

to the courtroom so that both sides could search [8] through those to see if there was additional evidence that supported or contradicted the claims made by Petitioner.

The Court has taken these extraordinary measures because the Court is of the view that if Petitioner is to be executed, it should be because there is confidence that the verdict of death imposed by the jury in 1986 was what the word "verdict" means: To speak the truth.

The decision for a jury to make in a capital trial at the penalty phase is based on complicated instructions.

But, to grossly summarize, it is as follows:

To determine whether or not the aggravating circumstances that the Commonwealth case claims apply to the case exists. These are set by statute;

To determine whether the mitigating circumstances the defense claims applied to the case exists. There are enumerated areas; but, then, there is also a catch-all that provides for anything and everything about the defendant and about the [9] circumstances of the crime that would make the case less deserving of a death sentence. And, obviously, the aggravating circumstances are things that the Commonwealth believes would make it more deserving of a death sentence.

If the jury unanimously finds beyond a reasonable doubt that there are aggravating circumstances and no mitigating circumstances, then the jury must return a sentence of death.

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If the jury unanimously finds beyond a reasonable doubt that there is one or more aggravating circumstance and any juror finds by a preponderance of the evidence that there is any mitigating circumstance, then the jury is to engage in a weighing, and is only to return a sentence of death where the jury concludes beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.

Here, the jury found no mitigating circumstances.

The cases are clear that a conviction based upon a lie cannot stand. So, it has been a critical determination for this [10] Court to decide what is the truth and what is not;

What it credible and what is not;

Who is to be believed and who is not.

In making its factual findings, the Court is free to believe some, all, or none of each of the witness's testimony.

Petitioner's first claim is that trial counsel failed to provide Constitutional effective assistance of counsel during the trial penalty phase.

He asserts that he was unfairly prejudiced when appellate counsel and the Pennsylvania courts were never given the opportunity to hear or rebut what the Commonwealth termed, quote, "anti-mitigation," closed quotes, evidence.

He alleges that the Third Circuit relied on this evidence in dismissing his habeas corpus petition in violation of the Superior Court's decision in the case of Cullen v. Pinholster, a 2011 case.

Petitioner fails to prove that this Court has jurisdiction over this claim, [11] and he cannot show that he was prejudiced, as the underlying issue was previously litigated. Therefore, this claim should not entitle petitioner to a stay of execution, or to any relief.

Petitioner fails to prove that this Court has jurisdiction to hear this PCRA claim under Section 9545 of Title 42 because this claim does not meet the criteria for one of the timeliness exceptions.

This claim does not involve governmental interference, nor does it involve newly discovered facts or recent retroactively-applied Supreme Court case law.

In fact, petitioner frames his argument as one of ineffectiveness of counsel.

The Pennsylvania Supreme Court noted in Bennett that, quote, An allegation of PCRA counsel's ineffectiveness could not be invoked as a newly-discovered fact for purposes of this subsection. We have steadfastly adhered to this principle. We firmly reject any such attempts to circumvent the one-year time limitation via claims of PCRA counsel ineffectiveness.

[12] This issue was, in fact, presented to the United States Supreme Court on a writ of certiorari which was

denied. Accordingly, this Court will not discuss this claim further.

As to petitioner's claim that the Commonwealth violated due process by suppressing evidence of Renee Rucker's crimen falsi convictions, the Court finds that counsel have failed to show that they could not have accessed this information at an earlier date with the exercise of due diligence and, therefore, this Court is without jurisdiction to entertain it. Additionally, the Court fails to see how the prejudice prong would be met.

Petitioner's claim that the Commonwealth failed to disclose impeachment evidence as to Marc Draper due to information he provided about a burglary he committed, which was orchestrated by Petitioner Williams, is meritless, as no reasonable defense counsel would have used that evidence.

As to the claim that there was a "deal" with Draper that was suppressed, the [13]Court finds that this claim could have been raised earlier by the exercise of due diligence, certainly as of the time of Draper's PCRA appending the 1988 letter from ADA Foulkes was filed; and, accordingly, this is untimely.

I would note that it seems like it could have been a viable claim under at least the first prong of Napue and Giglio, and might have satisfied the prejudice prong meriting a new trial.

This Court has not addressed, at this juncture, the claims relative to his conviction in the Hamilton case, but

at first blush thinks it may be untimely. I have focused my attention on the capital matter, which is of urgency given the time constraints and the date set for the execution of petitioner.

The Court finds that the petitioner is entitled to a stay of execution under Section 9545(c), given that petitioner has met his burden under Morris II to, quote, demonstrate:

One, that all the requirements of [14] this subchapter have been met;

Two, that there is a pending stay application;

And, Three, that there is a strong likelihood of success on the merits.

Petitioner exceeded the strong likelihood threshold, demonstrating actual success on the merits with respect to the penalty phase.

Under section 9545(c), petitioner needed to demonstrate that he met all the requirements of this subchapter.

Both Morris I and Morris II make it explicitly clear that the above language incorporated the jurisdictional provision of Section 9545(b) into the analysis of granting a stay of execution.

For this Court to have jurisdiction, that is, the power or authority to reach the merits of his claims, petitioner

must have established that his claims fall under at least one of three narrowly defined exceptions to the PCRA.

Here, petitioner maintained that he had met the following two exceptions:

[15] One, which is actually Subsection i, that the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth, or the Constitution or laws of the United States;

And, ii, that the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence.

This Court has jurisdiction in this case, given that petitioner demonstrated governmental interference pursuant to Section 9545(b)(1)(i), and that the claim, which could not have been raised earlier with the exercise of due diligence, was filed within 60 days of the date that it first could have been presented pursuant to Section 9545(b)(2).

Petitioner has proved that failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution.

Our Supreme Court mandates that [16] petitioner plead and prove that the failure to raise a claim previously was the result of interference by government officials. And

for that I cite Commonwealth v. Stokes, which was citing Commonwealth v. Hawkins.

By removing direct and indirect information which demonstrated that Amos Norwood had homosexual relationships with teenage boys from the statements that were turned over to the defense, the government interfered with the presentation of this claim.

In this case, the governmental interference is actually the Brady claim. They are one and the same.

The suppressed evidence establishes the fact that the government interfered.

The only way that petitioner could have demonstrated a Brady claim based upon the fact that there was information in the District Attorney's file and in the Philadelphia Police Department's file was to actually go into the files themselves.

Petitioner demonstrated that this [17] claim could not have been raised earlier by the exercise of due diligence, as is required by Commonwealth v. Yarris, Commonwealth v. Beasley, and Commonwealth v. Albrecht. And then petitioner brought this claim within 60 days from when the claim first could have been brought.

Petitioner established that the claim could not have been raised earlier with the exercise of due diligence through the affidavit and testimony of Marc Draper.

It is because of the statements in Mr. Draper's affidavit, in which he alleged that he made a statement about petitioner's motive for the crime, which was never disclosed to the defense, that this Court ordered the DA's and police boxes opened.

The information uncovered as a result of this Court's order could not have come to light if it weren't for Draper's original affidavit. Therefore, this Court analyzes whether this claim satisfies the due diligence requirement of Section 9545(b)(2) by determining whether petitioner exercised due diligence in learning of the information [18] contained in Mr. Draper's statement.

Mr. Draper stated in his affidavit and at the evidentiary hearing that he would not have spoken to Terry Williams' attorneys or anyone else about the events surrounding his life sentence for years.

In the late 1980s, Mr. Draper refused to speak with petitioner's counsel, and this is as per the Post-Sentence motion Notes of Testimony, he would not talk with Ed Chew when Nick Panarella sent him there.

At some point during his stay in Graterford, from 1996 to 2005, Mr. Draper again refused to talk with someone who came on petitioner's behalf.

Mr. Draper was credible when he said that his anger at Terry Williams, and at himself for having to serve a life sentence, prevented him from talking about the Norwood murder over the years.

The Court found that his explanation as to why he finally spoke up made sense.

Mr. Draper decided to break his silence on the subject because of the impact [19] of news of Terry Williams nearing execution in light of also having lost his appeals -- I'm sorry, in light of Williams having lost his appeals in March of 2011.

Terry Williams and Marc Draper were friends for a large portion of their youth.

The notion that Mr. Draper decided to put his own anger aside and speak up in order to spare the life of his childhood friend is not an incredible one, and the Court, in fact, credited it.

The Third Circuit denied Petitioner's habeas petition in March 2011.

Petitioner's counsel spoke with Mr. Draper nine months later in January of 2012.

Is a nine-month delay from the first moment when it could fairly be said that Terry Williams had lost his appeals until counsel's conversation with Mr. Draper not duly diligent? This Court finds that the nine-month delay is duly diligent within the meaning of Yarris.

Petitioner then filed his current [20] PCRA petition within 60 days of learning of the substance of Mr. Draper's January affidavit.

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Petitioner's claim is plainly not waived under Section 9544(b).

A claim of error is waived if the defendant or petitioner could have raised the issue at trial, on appeal, or in a prior post conviction proceeding but failed to do so.

Petitioner's claim of error in his PCRA was that the government suppressed evidence given by Marc Draper.

The PCRA court held an evidentiary hearing on that claim.

In the process of doing so, the District Attorney and Philadelphia Police trial boxes revealed the existence of suppressed evidence.

The Brady claim based on that evidence could not have been raised at any time prior to Marc Draper's statement that prior to the Norwood trial he told Ms. Foulkes and the police this case was really about a homosexual relationship, as it was only because of his statement that this Court [21] ordered that the trial boxes be opened.

Nor is Petitioner's claim previously litigated under Section 9544(a).

A claim of error is previously litigated when either the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue, or it has been raised and decided in a proceeding collaterally attacking the conviction or sentence.

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First, no court has ruled on the merits of Petitioner's current Brady claim.

Our Supreme Court addressed a claim of counsel's ineffectiveness for failing to investigate and present psychiatric mitigating evidence.

As part of that claim, petitioner elicited evidence from Donald Fisher that Mr. Norwood was very degrading and he liked to have sex with kids.

However, the current claim does not rest solely upon that evidence. In fact, it is based on evidence uncovered for the first time within the last two weeks.

The fact that the evidence inside [22] the DA and Police boxes corroborated evidence petitioner elicited at the 1998 PCRA hearing does not mean that his current claim has already been litigated.

The merits of the current issue revolve around whether or not the three prongs of Brady have been met, and that is Brady v. Maryland, whereas the merits of the previous issue was about ineffectiveness;

And, second, none of the claims raised by petitioner in the 1998 PCRA was based on the prosecution having suppressed Marc Draper's statement to the government or evidence of the victim's homosexual proclivities towards teenage boys. Not until Mr. Nolas amended his January 2012 PCRA petition in light of this Court's evidentiary hearing has petitioner raised the specific claim upon which relief is being granted.

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To be entitled to a stay of execution under Section 9545(c), petitioner is required to prove a strong likelihood of success on the merits.

Petitioner exceeds that threshold, proving that there was impeachment [23] evidence, which was material to punishment, and if disclosed could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict as to the jury's sentence of death. And I cite to Cone v. Bell for that proposition, a United States Supreme Court case.

Petitioner demonstrated that the government sanitized the statements of two witnesses, Mamie Norwood and Reverend Charles Poindexter, removing information that either directly or indirectly demonstrated that the victim was a homosexual ephebophiliac.

For those who do not know, an ephebophile is an adult who has a sexual attraction to teens.

Additionally, Andrea Foulkes failed to disclose evidence in her possession that the victim had made sexual advances on a teenage member of his church, and that there were other possible instances of sexual impropriety.

Without this evidence, petitioner's counsel was given a skewed and incomplete picture of the victim, which [24] effectively tied his hands while the prosecution elicited testimony at trial about his kind and caring character.

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If disclosed, the cumulative impact of this impeachment evidence would have enabled petitioner's counsel to challenge the government's sympathetic portrayal of the victim. Ultimately, the nondisclosure of that evidence undermines confidence in the jury's death sentence.

When undertaking the three-part Brady analysis, it is particularly instructive to compare the evidence in the government's possession against that which was given to petitioner's counsel in discovery.

A June 1984 police activity sheet revealed that the police learned during a June 22nd, 1984, interview -- Mr. Eisenberg and Ms. Godfrey, I will be happy to give you what I wrote, if you rather, so you don't have to be trying to get it down; I will be happy to share it -- that during a June 22nd, 1984, interview with Reverend Charles Poindexter that the victim may have been a homosexual, and that about five years prior to the [25] interview there had been a complaint from the mother of a 17-year old boy at church who said that the victim propositioned him for sex.

However, the version of the June 22, 1984, interview that the prosecution turned over to the defense omitted those portions of Reverend Poindexter's statement entirely.

The same June 1984 police activity sheet also revealed that the police learned that Mamie Norwood, the victim's widow, had told them about a time in which she awoke at 2 A.M. to find a young, slim male standing silently in the hallway of her home.

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Mrs. Norwood explained to police that her husband woke her to ask her for money. She then watched as her husband loaded some stereo equipment into his car, and then he got in and drove off with the young man.

Mrs. Norwood said that her husband returned home around 9 to 10:00 the next morning and told her a, quote, "rambling" story about being abducted, but how he was able to escape after using psychology on the captors until they fell asleep.

[26] Mrs. Norwood remembered that he pleaded with her not to get the police involved.

However, the version of Mrs. Norwood's statement turned over to the defense omitted this portion of her statement entirely.

A handwritten note by Assistant District Attorney Andrea Foulkes in the DA's office's file recounted a specific instance of Amos Norwood's homosexual ephebophilia.

She wrote the name of a young man, Ronald House, who had been "touched on privates" and that had heard from others about possible incidents. However, none of that information was turned over to the defense.

Without the evidence bearing an explicit or inferential connection to Amos Norwood's homosexual ephebophilia, the information that was actually provided to the defense created the false impression that references to Amos Norwood's homosexuality and alleged kidnapping were just red herrings.

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The government did disclose the statements of William Scott, Christopher [27] Wells, and Jesse Lofton, all of which included one question as to their knowledge of Amos Norwood's homosexuality. All three interviewees answered in the negative.

Additionally, Mr. Lofton mentioned the supposed kidnapping, but thought that it involved Mr. Norwood being held up at gunpoint at a red light, and was pretty sure it was reported to police.

The version of Reverend Poindexter's statement turned over to the defense mentioned the supposed kidnapping. He speculated that maybe it had something to do with drugs because Mr. Norwood worked as a chemist in New Jersey.

It is also worth noting that even though this non-disclosure was not about Amos Norwood, the police also failed to pass the search warrant of James Stallings' home, which revealed another middle-aged man with whom Terry Williams was very familiar had assorted nude photos of men laying around in his home, just as Herb Hamilton had.

Without the evidence above, the defense had one piece of information [28] suggesting that Mr. Norwood was a homosexual, Ronald Rucker's statement that "Terry said Amos was a homosexual and was the type to pay people." And the defense had one piece of information suggesting that Mr. Norwood was an ephebophile, Marc Draper's July 20th, 1984, statement in which he said that he asked

Mr. Norwood, "So you like boys?" To which Mr. Norwood had responded, "Yeah."

As I will discuss shortly regarding the materiality of all of this, the government's suppression not only deprived the defense of impeachment evidence with respect to Reverend Poindexter and Mamie Norwood, but it also resulted in painting an incomplete and misleading picture for defense counsel.

Evidence in the possession of the prosecution and the police are both subject to the Brady duty to disclose.

In order to comply with Brady, "The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police." And that's from Strickler v. Greene, another United States [29] Supreme Court case.

Our Supreme Court endorsed that same principle in Commonwealth v. Burke saying that Brady extends to evidence in the files of police agencies of the same government bringing the prosecution.

The June 1984 activity sheet which detailed the complete versions of the Poindexter and Norwood interviews was found in the H-84-127 police box. The search warrant of James Stallings' home was also found therein. The evidence is properly considered within the scope of the prosecutor's control under Burke.

There are three essential components of the Brady claim.

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The first essential component of a Brady violation, according Strickler, requires that the evidence at issue be favorable to the accused because it is exculpatory or because it is impeaching. The information pulled out of the respective statements of Mamie Norwood and Reverend Charles Poindexter would have allowed a reasonable defense counsel to impeach them [30] after having testified to the following. And this is from Mamie Norwood and Andrea Foulkes asking her:

"You had indicated in response to questions by the defense attorney that your husband didn't pick up strangers.

Did your husband have occasion to take young people back and forth from time to time in his car?

"MRS. NORWOOD: The ones that he worked with, yes, that I knew.

"MS. FOULKES: How much of his time would you say, if you know; how often would he do that? Often? Rarely? Middle?

"MRS. NORWOOD: It would be every week at some point.

"MS. FOULKES: And then from time to time he would chauffeur young people from one point to another, would he not?

"MRS. NORWOOD: The ones that I know he works with, yes.

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"MS. FOULKES: When he would do that, would he take those young people home?

"MRS. NORWOOD: Yes."

A little further down Ms. Foulkes [31] says:

"From time to time, did you ever see evidence of that chauffeuring process by things left in your car?

"MRS. NORWOOD: Yes, sometimes."

And that was from the Notes of Testimony of January 14th, 1986, at Pages 157 to 158.

As to Reverend Charles Poindexter, the following was asked.

Question by Ms. Foulkes:

"Did Mr. Norwood have any special responsibility in the church regarding youth?

"REVEREND POINDEXTER: Yes, he did.

"MS. FOULKES: What were those responsibilities?

"REVEREND POINDEXTER: He was warden for many years of the acolytes or the service of the church, and he was in charge, he was the founder and in charge of what we called the Youth Theater Fellowship, which dealt with youth between the ages of seven and eighteen.

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"MS. FOULKES: Were there [32] occasions, Reverend, in connection with his duties, where Mr. Norwood would come to the church in the night hours to fulfill some of these duties?

"REVEREND POINDEXTER: Yes, there were.

"MS. FOULKES: Also, in your contact with Mr. Norwood, did you observe him from time to time transport young people from the church activities to their homes or other locations?

"REVEREND POINDEXTER: Frequently."

And that was from Notes of Testimony, January 14th, 1986, at 166 and 167.

On Redirect Ms. Foulkes asked: "Reverend, from time to time, do the church activities extend beyond the people who are parishioners and members of the church?

"REVEREND POINDEXTER: Yes, they do."

On Recross Examination

Mr. Panarella asked:

"Certainly, church activities or [33] functions are for church members; is that correct?

"REVEREND POINDEXTER: Well, the activities that Mr. Norwood participated in very often involve

young people outside of our parish congregation. In fact, many who are now active came in as a result that kind of inclusion.

"MR. PANARELLA: And that would occur at organized functions; is that correct?

"REVEREND POINDEXTER: Not necessarily. Sometimes they were simply trip services where they were invited to participate.

"MR. PANARELLA: There were no church services occurring late in the evening on June 11th, were there?

"REVEREND POINDEXTER: Oh, no, of course not.

"MR. PANARELLA: And there is nothing of any youth activities or anything of that nature that was going to take place at your church at that time; correct?

"REVEREND POINDEXTER: No.

"MR. PANARELLA: So when you make [34] reference to unusual or that it would not be unusual to have non-church members come to church functions, it would have been extremely unusual to have a non-parishioner at the church when no church functions were going on?

"REVEREND POINDEXTER: No, it would not have been."

Ms. Foulkes objected, the Court overruled it, and then Reverend Poindexter said:

"No, it would not have been."

"MR. PANARELLA: It would not have been unusual to have a non-church member at a non-church function late at night when the church wasn't open to the public?

"REVEREND POINDEXTER: No.

"MR. PANARELLA: That's correct?

"REVEREND POINDEXTER: Would you like me to explain?

"MR. PANARELLA: Yes.

"REVEREND POINDEXTER: Very often, Mr. Norwood had friends of some of the young people to help with the building of the sets for the plays and, quite often, I saw him with young people or the people who were working [35] with him, people that I never knew before.

"MR. PANARELLA: Again, you never knew Mr. Williams?

"REVEREND POINDEXTER: I never knew Mr. Williams.

"MR. PANARELLA: Or Mr. Draper?

"REVEREND POINDEXTER: No.

"MR. PANARELLA: Now, you were aware, were you not, that Mr. Norwood had some problem in the past?

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"REVEREND POINDEXTER: Some problem?

"MS. FOULKES: Objection, Your Honor.

"THE COURT: Just a moment, I am going to sustain it. I don't know quite what it is or how it is related to the circumstances here, so I will have to sustain the objection at this time."

And Mr. Panarella at that time then said:

"I have nothing further."

And that's from the Notes at Pages 172 to 174.

Had the evidence detailed above [36] been disclosed, it could have been used by a reasonable defense attorney to impeach the testimony of both Mamie Norwood and Reverend Charles Poindexter, in which they characterize Mr. Norwood as a kind church volunteer who wanted to help out the kids of the neighborhood.

Demonstrating that Mr. Norwood may have had ulterior motives, the homosexual ephebophilia, would have been favorable to the accused in this case.

The second essential component of a Brady violation according to Strickler requires that the evidence at issue be suppressed by the government, either willfully or inadvertently. The sanitization of the statements turned over to defense counsel, and the non-disclosure of the substance of Ms. Foulkes' handwritten notes

demonstrates that evidence has plainly been suppressed. And it isn't that she had to turn over her personal notes, but the information that she had gleaned, albeit that she wasn't turning over her notes.

Furthermore, the evidence borne [37] out over the course of the evidentiary hearing about former ADA Foulkes' sometimes playing a little fast and loose suggests that the scale -- which you will hear shortly also additional factors -- tip toward a finding that the suppression was closer to willful than to inadvertent.

Ms. Foulkes had just prosecuted Terrance Williams for the murder of Herbert Hamilton. In that case, she opened on the following information:

"However, Terrance Williams also had a secret life, and that secret life was his engagement in making money by hustling homosexuals for favors, for money, for clothing, for anything of value to him, and Herbert Hamilton was one of a number of people that Terrance Williams engaged in this.

Herb Hamilton was not the only individual with whom Terrance Williams engaged in this kind of enterprise.

You'll hear from Marc Draper that Terrance Williams had told him that he, on other occasions, sought to earn money, make money, what have you, by having homosexual [38] acts with various individuals."

During the trial of this case, Ms. Foulkes also questioned -- that's the Hamilton case -- Ms. Foulkes also questioned Marc Draper as follows:

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"Now, on other occasions that Terry discussed how he obtained money, had Terry indicated to you that with other individuals from whom he had obtained money or clothing, that he had, indeed, engaged in sexual relations?"

Answer from Draper:

"Yes."

Ms. Foulkes admitted at the September 20th, 2012, PCRA hearing before this Court, when speaking about petitioner and Mr. Norwood:

"Did I suspect that there was a sexual connection between them? Yes, I did."

And that's from the Notes of Testimony of that date at Pages 103 and 104.

Despite her sense as to the truth of the relationship in the Norwood case, Ms. Foulkes still made the following argument in closing at the penalty phase of the Norwood [39] case:

"Now, Ladies and Gentlemen, you know the horrible circumstances of the death of Amos Norwood. You know that the defendant, Terrance Williams, for no other reason but that a kind man offered him a ride home, that he and another man tied him up in the darkness of a cemetery and beat him to death, squashed him like a bug that you might be irritated with against a windshield, beat him with two blunt instruments."

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That was from the Notes of Testimony of February 3rd, 1986, at Page 1873.

Ms. Foulkes indicated or maintained to this Court that she did not care if she got less than First Degree Murder in the Hamilton case, and that she didn't care if she got death in the Norwood case.

This Court did not find this testimony to be credible. Instead, the Court is constrained to say that she did, at times, play games and took unfair measures to win.

And the following are some items that I will point to evidence of that.

In terms of how Ms. Foulkes had [40] handled the deal that had allegedly been struck with Draper and that was challenged, on February 20, 1985 at Page 375 in the Hamilton trial she said to Mr. Draper:

"You agreed to plead to murder, robbery and conspiracy. Second Degree Murder is a life sentence," and he answered: "Yes."

"You agreed to testify in this case and in the case for which you are charged; is that correct?

"ANSWER: Yes.

"Is that the full extent of any deals or agreements between yourself and the Commonwealth?"

"ANSWER: Yes."

Although this is a claim that should have been raised earlier, the Court views this as evidence of her wanting to win. Based on the Napue and Giglio cases, this is indisputably not the whole truth. She knew she was writing the letter for him, and the language of the letter that she personally wrote clearly indicates that there had been a separate agreement. At the hearing here before me she acknowledged that language.

[41] And then at the Norwood trial regarding that deal, on Cross of Draper by Panarella, Draper is asked:

"Was there anything more agreed upon between you, your attorney, your family and the police or the District Attorney's Office, other than what is embodied in this document," which at the trial was C-18, the agreement which Arnold Gordon signed, who was Chief of Homicide at that time.

And his answer was:

"No."

"Not nothing at all?

"No."

Ms. Foulkes had a duty to correct this because she knew she had agreed to something more, to write to the Parole Board, which she, in fact, did in 1988. This issue

is noted here to show that this was a course of conduct by Ms. Foulkes.

Again, regarding the desire to win first degree murder in the Hamilton case, February 20th, 1985, at Pages 436-437.

Mr. Williams' attorney, Steve Gallagher was going to call Gregory Lowe, also [42] known as Gregory Lee.

Judge Sabo asked:

"What would he be able to testify to?"

Mr. Gallagher said he would testify to a conversation with Marc Draper, that Marc Draper told him the facts of this killing and that he's the one that did the stabbing. Ms. Foulkes then had the detectives go and speak to the witness up in the cell room, which at that time was in City Hall, after which he decided not to testify for Williams.

Gregory Lowe did testify at the PCRA hearing in 1990, and testified that after a visit form Detective Cimino, he decided not to testify on defendant's behalf to that effect, as he was told it would affect any plea agreement that he was trying to work out with the Commonwealth, or that it could affect that plea agreement.

At that same PCRA hearing, Detective Cimino testified that Andrea Foulkes did come to them and said that the defense was going to call Lowe. And that's at – Gregory [43] Lowe testifying was September 10th, 1990, at Page 17, and Detective Cimino testifying is at Page 44.

He said he did go up to the cell room to see Mr. Lowe, claiming he merely wanted to see if this was the same person who had been their informant on a number of cases, and that he was concerned for Mr. Lowe's safety because they were responsible for him.

Ms. Foulkes testified before me that she did have the detective go up to talk to them and to see what this was about.

Regarding letters that the defendant wrote and gave to Marc Draper hoping he would testify in conformity therewith, which, again, showed certain conduct by Ms. Foulkes I submit the following:

Ms. Foulkes provided both letters to Attorney Gallagher in the Hamilton trial on February 21st, 1985, as she was calling Marc Draper to rebut Williams' testimony.

In responding to the attorney's complaint about having been deprived of these prior to trial, it appears that Ms. Foulkes was not candid with the Court. And this is at [44] Pages 639 to 642 or 643.

A review of the record reflects that she told the judge she had only gotten the letters that Monday, February 18th, 1985, and it is possible that the letters were mailed to George Draper, but she purposely waited to turn them over.

George Draper testified at Page 682 about receiving the letters from his son. She doesn't ask him when he got

them on direct; but on Cross Mr. Gallagher brings out that George Draper had gotten them on January 18th, 1985, more than a month earlier, and that he had turned them over to his attorney on January 19th, 1985.

But P-8, which was marked as an exhibit in this hearing, and that P-8 was dated December 20th, 1984, a Thursday, Ms. Foulkes' personal notes indicate that she knows about the letters and her notes indicate that she is going to have Marc Draper provide them to the detective next Friday, which would have been no later than December 28th, 1984. Even if it hadn't been the next day, December 21st, it certainly would have been by [45] December 28th, 1984.

Then she claimed to the court, to Judge Sabo, that she had to protect Marc Draper, but the fact is that she could have and should have, instead, sought a protective order from the judge to keep from having to disclose those to the defense. And this is presented here merely to show another example of gamesmanship by Ms. Foulkes as further evidence that she wanted to win and she had no problem disregarding her ethical obligations, because this move was in the face of case law to the contrary, and I will cite to the Supreme Court case of Commonwealth v. Rodgers, R-o-d-g-e-r-s, for that proposition, a 1983 case out of Philadelphia. And, Ms. Foulkes was clearly up on her case law, as evidenced by her citing to Commonwealth v. Beasley.

The third and final essential component of a Brady violation according to Strickler requires that prejudice ensue.

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Prejudice in this context is defined by the concept of materiality.

Evidence is material when, according to Cone v. Bell, there is a [46] reasonable probability that, had the evidence been disclosed, the result of the proceedings would have been different. In other words, when the evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

When undertaking the materiality analysis, the court in Kyles v. Whitley offered four aspects of materiality to help guide the determination.

The fourth aspect is particularly relevant to this case. Quote, "Materiality to is be judged by reference to the suppressed evidence considered collectively, not item-by-item, with the focus on the cumulative effect of suppression," closed quotes.

There is no better proof that prejudice ensued than Ms. Foulkes' own admission. As someone who had the privilege of viewing the suppressed evidence in the government's possession collectively, she said, as quoted above, "Did I suspect that there was a sexual connection between them? Yes, I did." And when the Court asked her, "So maybe he is doing Norwood and getting [47] money," she responded, "No, of course that occurred to me." And that was Notes of Testimony of September 20th, 2012, at Pages 102-103.

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Ms. Foulkes stated of course she felt like there was a homosexual relationship between petitioner and Norwood because she was able to connect all of the dots.

Had reasonable defense counsel been given all of the dots, that attorney, too, would have been able to connect them, and, at the very least, stand up in closing in response to Ms. Foulkes' penalty phase statement that there was no other reason and argue that there is enough evidence to suggest that Amos Norwood was a homosexual ephebophile who was taking advantage of petitioner.

The existence of an unsympathetic victim can be, in and of itself, sufficient to undermine one's confidence that the jury would have returned the same verdict of death.

For all of the reasons stated herein, petitioner has demonstrated that he is entitled to relief in the form of a new penalty phase.

[48] And I would note that the items that I have cited as to comments regarding homosexuality that were in Ms. Foulkes' notes and that were made exhibits during the course of the trial both by petitioner, as well as by the court exhibits, is not. So what I mentioned here is not exclusive. There are more; I just haven't spoken to every single item.

However, the Court finds that petitioner cannot meet the materiality standard with regard to the guilt phase.

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Had the suppressed evidence been disclosed and a complete picture presented to defense counsel, a reasonable attorney would have had the information needed to make a compelling argument as to mitigation. However, the suppressed evidence would not have put forth facts upon which a heat-of-passion defense could have being rooted.

Additionally, the overwhelming consciousness of guilt evidence would have outweighed any attempt to argue that petitioner committed this killing in the heat [49] of passion. Therefore, the suppressed evidence does not undermine confidence in the verdict of guilt.

And, accordingly, this Court is granting the stay of execution, and this Court is granting a new penalty phase.

Thank you.

MS. GODFREY: Your Honor, there are a few housekeeping items.

There is a few things, including Notes of Testimony and Your Honor's order regarding the order of no communication between the Commonwealth and the defense and any witnesses that may still be under seal. Can you unseal them so that we can have access?

THE COURT: And to whom are you referring?

MS. GODFREY: The Notes of Testimony. Anything that occurred on the record in the back.

THE COURT: Absolutely. Everything is unsealed. Yes, absolutely.

MS. GODFREY: And can we have our boxes back?

[50] THE COURT: Yes. I will get those to you probably very shortly.

Anything else?

MR. NOLAS: Not right now, Your Honor. Thank you very much.

COURT OFFICER: This Court will take a short recess.

COURT OFFICER: This court is back in session. Please cease all conversation and take your seats.

MS. GODFREY: Your Honor, is it possible to get a copy of --

THE COURT: Let me give you a copy.

Ms. Godfrey, you should not take this as this is my opinion.

MS. GODFREY: Okay.

THE COURT: It is what I read into the record as the basis for my ruling. As I said, I didn't want you try to write down every word that I was saying, and I want you all to understand that.

Does defense counsel want one as well, or not?

[51]MR. NOLAS: Sure.

THE COURT: I am not trying to suggest that you should want one or not.

MR. NOLAS: Your Honor, I was not taking notes, so, yes, it would be very helpful. Thank you.

Is Your Honor going to do a formal order, or --

THE COURT: I am sure the clerk will write up a formal order granting the stay of execution and granting a new penalty phase.

Is there anything else?

MR. NOLAS: No, Your Honor.

Thank you very much.

COURT OFFICER: This court is adjourned.

APPENDIX P — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED MARCH 9, 2011

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-9002

TERRANCE WILLIAMS,

Appellant,

v.

JEFFREY BEARD, Commissioner, Pennsylvania Department of Corrections; LOUIS B. FOLINO, Superintendent of the State Correctional Institution at Greene; FRANK TENNIS, Acting Superintendent of the State Correctional Institution at Rockview; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

December 7, 2010, Argued
March 9, 2011, Filed

Before: SMITH, CHAGARES, and ALDISERT, Circuit Judges.

OPINION

SMITH, *Circuit Judge.*

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Twenty-five years ago, petitioner Terrance Williams was tried and convicted of first degree murder for the killing of Amos Norwood. A jury then returned a sentence of death. After two decades of appeals in the Pennsylvania state courts, Williams filed a petition for federal habeas review pursuant to 28 U.S.C. § 2254. The District Court denied the petition but certified two questions for our review, to wit: (1) whether trial counsel was constitutionally ineffective during the penalty phase of trial, and (2) whether the Commonwealth exercised its peremptory strikes in a racially discriminatory manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). We permitted Williams to expand the certificate of appealability to include a question regarding the constitutional propriety of the trial court's accomplice liability instructions. We conclude that each issue is without merit and will affirm.

I

The story of Terrance Williams is reminiscent of Dr. Jekyll and Mr. Hyde. As Dr. Jekyll, Williams was a local football star, the quarterback of the Germantown High School team that won the Philadelphia Public League championship in 1982. He was presented with the sportsman of the year award by the Philadelphia Board of Sports Officials, and he was recruited by at least eight different collegiate institutions. Nearly all of Williams' coaches and teachers described him as mild-mannered, law-abiding, and honest. In 1983, Williams graduated from Germantown High and matriculated to Cheney State College in Philadelphia. In the estimation of one of his

instructors, Williams was "highly respected and admired by his teacher[s] and all of his classmates." He was "[n]ot only . . . the star of the school's football team, but [was] also . . . a classmate and student who showed respect for others and accepted his popularity with modesty."

But apparently Terrance Williams had a sinister side. In the dead of night on Christmas Eve in 1982, a sixteen-year-old Williams broke into the Philadelphia residence of Don and Hilda Dorfman, aged sixty-nine and sixty-four, respectively. He entered Mrs. Dorfman's bedroom, wakened her by pressing a .22 caliber Winchester rifle to her neck, and then pulled a bedsheet over her face. When Mrs. Dorfman attempted to remove the sheet, Williams ordered her to stop "or her fucking head would be blown off." Williams then fired the rifle three times into the wall to show the victims he was serious. Williams and an accomplice ransacked the home before making off with cash, jewelry, and the Dorfmans' automobile.

It was not long before Williams was apprehended and criminally charged for robbing and terrorizing the Dorfmans. Although his age placed him under the jurisdiction of the juvenile court, the Commonwealth moved to certify Williams as an adult. In an attempt to avoid certification, Williams produced no fewer than eight witnesses who attested to his stable home life, loving parents, and supportive extended family. Every character witness interviewed by the Commonwealth believed Williams to be innocent. Even his own attorney would testify years later, "I didn't feel in my own mind of mind[s] and heart of hearts that [Williams] was involved in the matter." Such was the nature of Williams' dual existence.

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In spite of the efforts to avoid it, Williams was certified to stand trial as an adult. He was released pending trial, however, and in January of 1984, he embarked in earnest on a crime spree that would continue for the better part of six months. Williams' next victim was a fifty-one-year-old man named Herbert Hamilton, an individual from whom Williams had been receiving money in exchange for sex. This relationship, like much else in Williams' life, was kept hidden from most who knew him. Hamilton apparently threatened to publicize the secret, so Williams took action.

On January 26, 1984, Williams called on Hamilton at his home. The two eventually retired to the bedroom and, as they proceeded toward the bed, Williams withdrew a concealed ten-inch butcher knife and attempted to stab Hamilton. Hamilton fought back, wrestled the knife from Williams, and stabbed Williams in the chest. Hamilton then dropped the knife and ran into the kitchen to telephone for assistance. Meanwhile, Williams retrieved a nearby baseball bat, chased after Hamilton, and beat him with the bat until Hamilton was bloody and severely wounded. Williams then recovered the butcher knife and stabbed Hamilton approximately twenty times--twice in the head, ten times in the back, once in the neck, four times in the chest, and once each in the abdomen, arm, and thumb. Finally, Williams drove the butcher knife through the back of Hamilton's neck until it protruded through the other side. He then doused Hamilton's body with kerosene and unsuccessfully attempted to set fire to it. When police officers later entered the apartment, they found Hamilton's kerosene-soaked body with the knife jammed through his neck; on the bathroom mirror, the

phrase "I loved you" was scrawled in toothpaste. Williams was then seventeen.

The Hamilton murder remained unsolved at the time that Williams went to trial for the Dorfman robbery in February of 1984. Williams maintained his innocence of the robbery throughout trial. He and his counsel mustered at least nine character witnesses who testified that Williams was a peaceful, law-abiding, and honest young man. The jury was not persuaded. They returned a conviction for two counts of robbery as felonies of the first degree, one count of burglary, one count of simple assault, one count of unauthorized use of an automobile, and one count of conspiracy. Williams was nevertheless released pending sentencing. Tragically, his crime spree continued.

On June 11, 1984, Williams and a friend, Marc Draper, were gambling with several others on a street corner in the West Mount Airy neighborhood of Philadelphia. It was not long before both young men lost all of their money. While brainstorming potential means by which to recoup their losses, Williams said that he knew a man who lived nearby from whom they could extort cash.[1] According

1. Approximately one month before this date, Williams and Draper were arrested for the armed robbery of fifty-three-year-old Robert Hill, an acquaintance of the late Herbert Hamilton. The Commonwealth discontinued the prosecution for this offense after Williams was sentenced to death for the Norwood killing. Evidence of the crime was not presented to the Norwood jury during the trial's penalty phase and was not offered by the Commonwealth during the PCRA proceeding. Given these circumstances, we have not considered the facts relating to this offense for purposes of our present inquiry.

to Williams, this individual--fifty-six-year-old Amos Norwood--was a closeted homosexual. With a plan that they would threaten to reveal Norwood's secret to his wife, Draper and Williams set off for Norwood's apartment.

When they arrived at Norwood's residence, Williams told Draper to wait outside. Williams emerged with $10 in cash approximately twenty minutes later. Williams and Draper were apparently satisfied with this amount because they returned to the street corner to resume gambling. A short time later, Norwood drove by the corner in his blue Chrysler LeBaron. When he spotted the vehicle, Williams said, "There goes my uncle," flagged down the car, and entered via the passenger side door. Norwood then drove away.

The blue LeBaron returned to the intersection several minutes later, whereupon Williams exited the vehicle, approached Draper, and said quietly, "Play it off like you going home, like you want a ride home, and we gonna take some money." Draper understood Williams to be proposing a robbery. The two then got inside Norwood's automobile and Draper began to provide false directions to his "home." In reality, Draper's directions led Norwood to a secluded area adjacent to the Ivy Hill Cemetery. Once there, Draper reached over the backseat, grabbed Norwood from behind and ordered him "to be quiet and get out of the car." Norwood stopped the vehicle and complied.

Williams and Draper then led Norwood into the cemetery and ordered him to lie facedown near a

tombstone. A quick search of Norwood's person revealed $20 hidden in his sock. At this point, Norwood began to plead for his life. The two assailants responded by removing Norwood's clothing and tying him up; Norwood's hands were bound behind his back with his shirt, his legs were bound together with his pants, and his socks were forcefully jammed into his mouth. Once Norwood was bound, Williams said to Draper, "Wait, I'm going to the car. We're getting ready to do something." And he walked off.

Williams returned with a tire iron and a socket wrench, the latter of which he gave to Draper. Draper, seemingly having second thoughts, urged Williams to leave. Williams replied, "I know what I'm doin, I know what I'm doin. Don't worry about it, I know what I'm doin." He then began battering Norwood's head with the tire iron. When he noticed that Draper was frozen in place, Williams said, "Man, you with me[?] We got to do this together." Draper then sprung into action himself, striking Norwood repeatedly with the socket wrench. This violent scene continued until Norwood lay motionless and dead. Draper later recalled that there was blood everywhere. On the day of his second murder, Williams was four months past his eighteenth birthday.

Williams and Draper soon parted ways. Draper reported to work, while Williams took Norwood's automobile downtown to meet a friend, Ronald Rucker. Rucker noticed that Williams was "hyper" and asked him if everything was okay. Williams then disclosed that he had just "offed a guy" named Amos. Although Rucker

initially did not believe his friend, he began to reconsider after observing blood stains on Williams' shoes. Later that night, Williams told Rucker he was "going to get some gas from a gas station to go back to the scene of the crime." Rucker surmised that Williams intended to burn Norwood's body. That is precisely what Williams did.

Williams and Draper were eventually undone by their use of a credit card and telephone calling card--both in Norwood's name--that they had taken from Norwood's automobile. Philadelphia police traced use of the calling card back to Rucker; upon questioning, he implicated Williams and Draper. When his interview with law enforcement concluded, Rucker informed Williams that he had provided police with Williams' last name. Panicked, Williams boarded a bus bound for San Francisco. In the meantime, Draper was arrested and promptly confessed. He also told police about the Herbert Hamilton killing. With this information, officers proceeded to obtain a warrant for Williams' arrest.

Approximately halfway through his cross-country bus ride, Williams telephoned his girlfriend, Marlene Rogers. Rogers informed him about the outstanding arrest warrant, and urged her boyfriend to return to Philadelphia so that he could defend the charges against him. Her entreaty was apparently convincing, for Williams promptly boarded an airplane and returned east. On July 23, 1984, he arranged to be arrested in the Philadelphia office of his attorney, Ronald White. Williams' mother notified a reporter from the *Daily News* that her son would surrender to authorities in White's office. Before

his arrest, Williams told the newspaper, "I wanted to come back and clear my name." The reporter snapped photographs as Williams was led out of White's office in handcuffs.

Two days later, Williams was sentenced to twelve-and-a-half to twenty years' imprisonment for his participation in the Dorfman robbery. In February 1985, he was tried and convicted of third degree murder for the Hamilton killing. Finally, a jury trial for the Norwood murder commenced in January of 1986 in the Philadelphia Court of Common Pleas. Draper testified for the Commonwealth and detailed the manner in which he and Williams guided Norwood to the Ivy Hill Cemetery, robbed and bound him, and then beat him to death. Williams later took the stand in his own defense and pinned the murder on Draper and another individual, Michael Hopkins. The jury rejected Williams' testimony and returned a conviction for first degree murder, robbery, and conspiracy.

The trial's penalty phase began immediately after the jury announced its verdict.[2] The Commonwealth introduced evidence that Williams was recently convicted of armed robbery and third degree murder. Williams, in turn, presented three witnesses in mitigation. His mother, Patricia Kemp, described her son's athletic success and

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2. At the time of Williams' trial and conviction, Pennsylvania law required that "[a]fter a verdict of murder of the first degree is recorded and before the jury is discharged, the court shall conduct a separate sentencing hearing in which the jury shall determine whether the defendant shall be sentenced to death or life imprisonment." 42 Pa. Cons. Stat. § 9711(a)(1).

testified that he was well-liked and respected by those who knew him. She also characterized Williams' stepfather as a verbally abusive alcoholic who routinely berated her son and once pushed him down a flight of stairs. Ms. Kemp denied participating in any abuse herself. Marlene Rogers, Williams' girlfriend and the mother of his thirteen-month-old child, said that Williams was a "very supportive father" and had never been violent towards her or anyone she knew. The defendant's last mitigation witness added little, rambling that "we all have sinned and come short of the glory of God . . . . We all have committed murder. We all have stolen some things that we should not have done. We all have committed adultery. I don't believe you should kill another person. Blood will be on your hands."

After witness testimony was complete, Williams' trial counsel, Nicholas Panarella, closed by emphasizing the defendant's youth at the time of the murder and by urging the jury to find that age was a mitigating factor in the offense. He then asked that they consider any residual doubt remaining from the guilt phase and argued that a sentence of life imprisonment was sufficiently severe, for it would subject Williams to "all of the brutalities that are associated with prison life." Panarella concluded by pleading for mercy. His plea was rejected. The jury found two aggravating circumstances, namely (1) that the murder occurred during commission of a felony (robbery), 42 Pa. Cons. Stat. § 9711(d)(6), and (2) that Williams had a significant history of felony convictions involving the use or threat of violence, 42 Pa. Cons. Stat. § 9711(d)(9). The jury found that there were no mitigating circumstances present in the case. They returned a sentence of death.

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II

Williams has been contesting the jury's death sentence almost from the moment it was announced on February 4, 1986. Shortly after trial, he dismissed Panarella and obtained new counsel, Norris Gelman. Gelman promptly filed a motion for a new trial on ineffective assistance of counsel grounds. On April 24 and July 1, 1987, the trial court held hearings on the motion during which Panarella was called to the stand to provide testimony on his mitigation strategy. He indicated that his central focus was Williams' youth, which he believed to be the mitigating factor most applicable under § 9711 of the Pennsylvania Consolidated Statutes. Panarella also explained that Williams provided him little, if any, assistance, which frustrated efforts to present a strong cadre of character witnesses on the defendant's behalf. Finally, when asked why he did not proffer evidence that Williams was psychologically damaged, Panarella was frank:

My own personal observations of Mr. Williams were and are that he is a very cold, calculating person. I did not discern any area where there was any doubt in my mind or that would have caused me to consider the fact that he was either not qualified or incapable of standing trial or facing punishment.

At the conclusion of the hearing on July 1, 1987, Williams' motion for a new trial was denied. The trial court thereafter sentenced him to death on the first degree murder conviction.

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On February 8, 1990, the Pennsylvania Supreme Court affirmed the trial court's judgment and conviction. *See Commonwealth v. Williams (Williams I)*, 524 Pa. 218, 570 A.2d 75 (Pa. 1990). Williams did not petition for *certiorari* in the United States Supreme Court. He did, however, timely file a pro se petition for relief under Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. Cons. Stat. § 9541 *et seq.*[3] New counsel was appointed and filed an amended petition raising twenty-three separate claims for relief.[4] Among them, Williams argued that the Commonwealth exercised its peremptory strikes in a racially discriminatory manner, in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), and that Panarella provided constitutionally ineffective assistance during the trial's penalty phase. The Court of Common Pleas denied relief on October 20, 1998, and on December 22, 2004, the Pennsylvania Supreme Court affirmed over the dissent of two justices.[5] *See Commonwealth v. Williams (Williams II)*, 581 Pa. 57, 863 A.2d 505 (Pa. 2004).

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3. Williams' PCRA petition was timely because he filed it before the post-conviction statute was amended to require petitioners to seek collateral relief within one year of the date that judgment becomes final. *See* 42 Pa. Cons. Stat. § 9545(b); *see also Lewis v. Horn*, 581 F.3d 92, 97 n.2 (3d Cir. 2009).

4. For a comprehensive compilation, see the May 8, 2007 order filed by the District Court. *Williams v. Beard*, 2007 U.S. Dist. LEXIS 41310, at *7-10 (E.D. Pa. May 8, 2007).

5. Williams filed a second PCRA petition on February 18, 2005. The Common Pleas Court dismissed the petition as untimely under 42 Pa. Cons. Stat. § 9545, and the Pennsylvania Supreme Court affirmed on September 27, 2006.

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In July of 2005, Williams filed a timely petition for a writ of habeas corpus in the United States District Court for the Eastern District of Pennsylvania. He therein raised a total of twenty-one claims, most of them not pertinent to the instant appeal. The District Court denied the petition in a thorough memorandum dated May 8, 2007, but granted Williams a certificate of appealability on two issues: (1) whether the Commonwealth exercised its peremptory strikes in a racially discriminatory manner, and (2) whether trial counsel was constitutionally ineffective during the penalty phase. We later granted Williams' motion to expand the certificate of appealability, permitting him to contest the constitutionality of the trial court's jury instructions on accomplice liability.[6] We address each of these issues in turn.

III

The District Court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. We have jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. The District Court did not conduct an evidentiary hearing in this case, instead limiting itself to the evidence contained in the state court record. Our

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6. We also granted Williams' motion to certify a fourth issue for review, namely: whether the aggravating circumstance set forth at 42 Pa. Cons. Stat. § 9711(d)(6) was improperly applied by the jury in violation of due process and the Eighth Amendment. Williams later abandoned this issue, stating, "Since the jury found another valid aggravating circumstance and no mitigating factors, Petitioner does not believe he can show prejudice resulting from this error and will not pursue this claim." Appellant Br. at 1 n.1. Accordingly, we do not address this contention.

review of the District Court's legal conclusions is therefore plenary, and we evaluate "'the state courts' determinations under the same standard that the District Court was required to apply.'" *Lewis v. Horn*, 581 F.3d 92, 100 (3d Cir. 2009) (quoting *Thomas v. Horn*, 570 F.3d 105, 113 (3d Cir. 2009)).

Review of the instant petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2241 *et seq. Hardcastle v. Horn*, 368 F.3d 246, 254 (3d Cir. 2004) (petitions filed after April 1996 subject to AEDPA standards). For inmates such as Williams, who are incarcerated by the state, AEDPA prohibits federal court relief on claims which have not been presented to the state's tribunals. *See* 28 U.S.C. § 2254(b). If a petitioner's claim has been adjudicated on the merits in state court, habeas relief is precluded unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." § 2254(d). Thus, AEDPA erects "'a substantially higher threshold' for obtaining relief than de novo review." *Renico v. Lett*, U.S. , 130 S. Ct. 1855, 1862, 176 L. Ed. 2d 678 (2010) (quoting *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 167 L. Ed. 2d 836 (2007)). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state- court decision applied clearly established federal law erroneously or incorrectly," *Williams v. Taylor*, 529

U.S. 362, 411, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); relief instead requires a determination that the state court's application was unreasonable, *Renico*, U.S. , 130 S. Ct. at 1862.

In addition, AEDPA endows a state tribunal's findings of fact with a "presumption of correctness," and this presumption extends "to the factual determinations of state trial and appellate courts." *Duncan v. Morton*, 256 F.3d 189, 196 (3d Cir. 2001) (citing 28 U.S.C. § 2254(e)(1) and *Dickerson v. Vaughn*, 90 F.3d 87, 90 (3d Cir. 1996)). To overcome the presumption, a habeas petitioner must proffer clear and convincing evidence to show that a factual determination is "objectively unreasonable in light of the evidence presented in the state-court proceeding."[7]

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7. Section 2254(e)(1) refers to a state court's specific factual determinations--in other words, the discrete findings that "are subsidiary to the ultimate decision." *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004). These findings may be set aside only upon a showing that there is clear and convincing evidence to the contrary. A challenge to the state courts' ultimate factual determination proceeds under § 2254(d)(2). That section, which refers to "an unreasonable determination of facts in light of the evidence presented in the State Court proceeding," requires a federal habeas court to "assess whether the state court's determination was reasonable or unreasonable" given the totality of the evidence adduced in the state tribunal. *Lambert*, 387 F.3d at 235. A challenge to the state court's individual findings of fact under § 2254(e)(1) may be based "wholly or in part on evidence outside the state trial record." *Id.* However, "even if a state court's individual factual determinations are overturned, what factual findings remain to support the state court decision must still be weighed under the overarching standard of section 2254(d)(2)." *Id.* at 235-36.

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Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). Our review proceeds under this AEDPA rubric.

A *Batson* Claim

Williams, who is an African American male, argues that the Commonwealth's use of peremptory challenges during jury selection violated *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In *Batson*, the Supreme Court held that deliberate or purposeful exclusion of African Americans from jury service violates the Equal Protection Clause. *Batson*, 476 U.S. at 84. The decision set forth a three-step procedure for evaluating claims of discrimination in the jury selection process:

> First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination.

Miller-El, 537 U.S. at 328-29 (discussing three-step inquiry and citing *Batson*, 476 U.S. at 96-98). *Batson* was handed down in April 1986--four months after the jury was empaneled to hear the Norwood murder trial. However, because Williams' conviction was pending on direct review at the time Batson was decided, its holding

applies retroactively to jury selection in the Norwood case. *See Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). We thus begin our review of Williams' *Batson* claim by reconstructing the voir dire, which commenced on January 6, 1986.

Each party was afforded a total of twenty peremptory challenges. The Commonwealth exercised its first two strikes on African American venirepersons; this prompted Panarella to object and led to the following exchange:

> MR. PANARELLA: Your Honor, I'm not sure of the case but there was a recent case which dealt with an attempt by the State or the Commonwealth to systematically exclude blacks from the jury. I think it would be appropriate if we were to ask the Commonwealth on what basis they exercised the peremptory challenge.
>
> THE COURT: Anything you want to say? [PROSECUTOR]: No, your Honor, and I might point out that the defense has exercised its peremptory challenges. I believe that this may be only the first challenge that I have exercised at all.
>
> THE COURT: So far, the defense has challenged peremptorily two persons who, incidentally, both of whom were white. The Commonwealth has peremptorily challenged two persons who, incidentally, both of whom are black. The Court is very cognizant of the law in that

> area; however, at this point, I can see nothing that suggests that the peremptory challenges are being based on race alone. I'm not going to ask the Commonwealth to set forth the reason; however, I will ask Miss Foulkes if the peremptory challenges are being based on race alone?
>
> [PROSECUTOR]: Absolutely not, your Honor. I might suggest they are not being based on race at all.
>
> THE COURT: Thank you very much. The record will reflect your objection.

The Commonwealth then used its next two peremptory challenges to strike two more African American members of the venire. Panarella objected a second time, stating, "I have raised an objection with respect to how she has raised her peremptory challenges."[8] The trial judge then stated,

> With respect to your objection concerning the use of peremptory challenges, that is your right and if there's anything you want to say further regarding that, you are free to say it. . . . You made your position plain the last time, Miss Foulkes, and I continue to accept that you are

8. The Commonwealth argues that Panarella's statement does not constitute an objection. This assertion is belied by the record. The trial judge himself characterized the statement as an "objection," and certainly responded in a manner indicating that he was ruling on a formal objection.

> challenging people without respect to race but with respect to what other determinations you choose to make which you believe to be right under the law.

In response, the prosecutor, Andrea Foulkes, simply noted that "the record will speak for itself."

The Commonwealth thereafter struck ten additional African American venirepersons. Panarella did not object to the exercise of any of these strikes. In sum, fourteen of the sixteen peremptory challenges exercised by the prosecutor were utilized to dismiss African Americans. She struck fourteen of the nineteen African American venire members that she had the opportunity to peremptorily dismiss. In contrast, Foulkes struck only two of the twenty-one white individuals she had the opportunity to peremptorily excuse. At the conclusion of voir dire, the trial court empaneled a jury composed of five black jurors and seven white jurors.

Williams did not advance a *Batson* challenge on direct appeal. He did, however, raise the issue in his PCRA petition. Williams' petition also asserted that his trial counsel was ineffective "for failing to insist that [the prosecutor] provide race neutral reasons for her challenges," and that appellate counsel was ineffective for neglecting to raise a *Batson* claim on direct appeal. In April 1998, twelve years after jury selection in the Norwood murder trial, the PCRA court held an evidentiary hearing on the issue.

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At the outset of the hearing, the PCRA court provided Williams with several pages of notes that the judge had taken during voir dire.[9] The court summarized its notes for the record:

> There were 111 prospective jurors called. That's [the] total composition of the jury panel from which the jury was selected. Of those 111, 68 were white and 43 were black. The composition of the jury, the 12 principal jurors, was 7 white and 5 black. Total perempts-- neither side used the full quota of 20 perempts. The total perempts were 35, 18 of which were applied to white prospective jurors, 17 to black prospective jurors.
>
> The Commonwealth utilized 16 peremptory challenges, 2 of white jurors, 14 of black jurors. The defense used 19 peremptory challenges, 16 of white jurors, 3 of black jurors.

Williams then called Foulkes to the stand. She provided an explanation for each of her peremptory challenges and stated that she "categorically did not" strike any venireperson on the basis of race. Foulkes also testified that in order to prepare for the PCRA hearing, she reviewed a transcript of voir dire as well as the handwritten notes

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9. Williams was tried in the Philadelphia Court of Common Pleas before the Honorable David N. Savitt, Jr. Pursuant to 42 Pa. Cons. Stat. § 9545, jurisdiction over a PCRA proceeding lies in the Common Pleas court. Accordingly, Judge Savitt also presided over Williams' petition for collateral relief.

that she took during jury selection. After reviewing both the transcript and the notes, Foulkes created a one-page document that summarized, to the best of her recollection, the rationale behind each peremptory challenge. She used this summary to aid her PCRA testimony, though she acknowledged that she was unable to remember each of her reasons for exercising a strike. Williams' counsel was provided a copy of the one-page summary and used it to question Foulkes during the hearing.

In addition, Williams moved for production of the handwritten notes that Foulkes took contemporaneous with voir dire. He argued that production of the notes was necessary so that he could discover whether Foulkes recorded the race of each potential juror, and to check the veracity of her testimony. The PCRA court reviewed the contemporaneous notes *in camera* and thereafter denied Williams' request. According to the court, the notes contained

> nothing [] that needs to be supplied to defense counsel or to be made part of the record. Miss Foulkes was called by the defense and testified fully and completely using, in a very limited way, the notes that are the subject of this inquiry to refresh her recollection. Under the circumstances, . . . no further discovery is warranted.

In a written order dated January 13, 1999, the PCRA court denied Williams' *Batson* challenge, concluding that he had failed to make out a prima facie case at step one

of *Batson*'s three-step analytical framework.[10] Williams appealed, and the Pennsylvania Supreme Court ruled that the Batson claim was waived because it was not presented on direct appeal. It then turned to the derivative ineffective assistance of counsel claims. To assess these claims, the court looked to the underlying *Batson* challenge. Under Pennsylvania law, as set forth in *Commonwealth v. Uderra*, 580 Pa. 492, 862 A.2d 74 (Pa. 2004), the failure to raise a Batson objection during voir dire deprives a petitioner of *Batson*'s three-step burden-shifting procedure. A petitioner so deprived must instead shoulder the burden to prove actual, purposeful discrimination by a preponderance of the evidence. The Pennsylvania Supreme Court found that Williams' "trial counsel did not raise a *Batson* objection during *voir dire*," and thus the Uderra rule applied. *Williams II*, 863 A.2d at 514. It then determined that Williams had not marshaled evidence sufficient to prove actual, purposeful discrimination. *Id.* at 515. In other words, the Pennsylvania Supreme Court held that the underlying *Batson* claim was without merit. Because the *Batson* claim was meritless, Williams' trial and appellate counsel could not have been ineffective for failing to raise it. Finally, the court rejected Williams' contention that he was entitled to production of Foulkes' contemporaneous handwritten notes, concluding that he had "fail[ed] to demonstrate exceptional circumstances existed which required production of the actual notes." *Id.* at 515 n.10 (citing 42 Pa. Cons. Stat. § 9545(d)(2) ("No discovery, at any stage of proceedings under this

10. The PCRA court did not address Williams' derivative claims of trial and appellate counsel's ineffectiveness.

subchapter, shall be permitted except upon leave of court with a showing of exceptional circumstances.")).

Williams' federal habeas petition presented both his *Batson* claim and the derivative claims of ineffective assistance of counsel. He also requested an evidentiary hearing and an opportunity to discover Foulkes' handwritten notes. The District Court denied Williams' request for discovery, addressed the *Batson* claim on its merits,[11] and held that the PCRA court unreasonably applied clearly established federal law when it concluded that Williams had not made a prima facie showing of racial discrimination at step one of the *Batson* analysis. Even so, the District Court found that the Commonwealth proffered clear and reasonably specific race-neutral reasons for its peremptory strikes and that, in the face of such a proffer, Williams was unable to show purposeful discrimination in the Commonwealth's selection of jurors. Therefore, the Court held that Williams' *Batson* challenge was without merit.

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11. The District Court correctly held that Williams did not procedurally default his *Batson* claim by failing to raise it on direct appeal. *See Wilson v. Beard*, 589 F.3d 651, 658 (3d Cir. 2009) ("As we have held on numerous occasions, in capital cases where the waiver occurred before the Pennsylvania Supreme Court made it clear that it would no longer apply the relaxed waiver rule, the waiver rule was not 'firmly established and regularly followed' and, therefore, the waiver is not an adequate basis for a finding of procedural default."). The Commonwealth does not contest this aspect of the District Court's opinion.

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Williams contends that the District Court erred in three respects: first, it should have compelled production of the handwritten notes; second, it should have conducted an evidentiary hearing to allow Williams to question Foulkes regarding the content of the notes; and third, it should have concluded that the Commonwealth's use of peremptory challenges contravened *Batson*. The Commonwealth offers rejoinders to each of these arguments and identifies two alleged errors of its own. Specifically, the Commonwealth claims that (1) the Pennsylvania Supreme Court's application of the rule announced in *Commonwealth v. Uderra*, 580 Pa. 492, 862 A.2d 74 (Pa. 2004), is reasonable and governs the analysis of Williams' *Batson* challenge; and (2) even if the *Uderra* rule does not apply, the PCRA court reasonably concluded that Williams failed to make a prima facie showing of purposeful discrimination.[12] We address each of these competing claims below.

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12. The Commonwealth also claims that under our recent decision in *Abu-Jamal v. Horn*, 520 F.3d 272 (3d Cir. 2008), Williams may only challenge the prosecutor's second peremptory strike, for this is the only strike to which he contemporaneously objected. In *Abu-Jamal*, we held that a timely, contemporaneous objection is required in order to preserve a *Batson* issue for appeal. 520 F.3d at 284. We explained that the failure to object during voir dire prevents the trial court from fulfilling responsibilities that are critical to the *Batson* framework, namely: evaluating the prosecutor's credibility and demeanor and, if necessary, promptly remedying defects in the selection process. *See id.* at 281-82. In this case, there is no question that Williams raised an objection after the Commonwealth exercised its second peremptory strike. Williams then objected again following the prosecutor's fourth peremptory challenge. By raising two objections during jury

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1 Production of Prosecutor's Notes & Evidentiary Hearing

Williams argues that the PCRA court denied him a full and fair opportunity to litigate his *Batson* claim when it rejected his request to produce Foulkes' contemporaneous voir dire notes. He does not ask us to review the state court's evidentiary decision, but instead argues that under federal law, he is entitled to production of the notes so that he may pursue his § 2254 claims in federal court. Williams petitioned the District Court for production of the notes and for an evidentiary hearing in which to probe the rationale underlying the Commonwealth's exercise of peremptory challenges. The District Court denied both requests. Williams claims that this ruling was in error.

Discovery in § 2254 litigation proceeds according to Rule 6 of the Rules Governing § 2254 Cases. That provision states, "A judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Civil Procedure and may limit the extent of discovery." Accordingly, habeas petitioners are entitled to discovery only upon a showing of "good cause," and even then, the

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selection, Williams satisfied the contemporaneous objection requirement. See Lewis, 581 F.3d at 102 (requiring "a timely objection" to preserve a Batson claim under *Abu-Jamal* (emphasis added)). He unequivocally put the trial court on notice of his equal protection challenge and he allowed the court to inquire as necessary. The court had an opportunity to evaluate the prosecutor and, if it deemed appropriate, to investigate the reasons underlying the strikes. This is all that *Abu-Jamal* requires. The Commonwealth's arguments to the contrary are without merit.

scope of discovery is subject to a district court's sound discretion. *See Harris v. Nelson*, 394 U.S. 286, 299-300, 89 S. Ct. 1082, 22 L. Ed. 2d 281 (1969) (discussing pre-Rule 6 discovery standard); *Bracy v. Gramley*, 520 U.S. 899, 909, 117 S. Ct. 1793, 138 L. Ed. 2d 97 (1997) (explaining that Rule 6 was meant to be consistent with Harris); *see also Deputy v. Taylor*, 19 F.3d 1485, 1493 (3d Cir. 1994) ("A district court sitting in a habeas case retains the discretion to permit additional discovery if the petitioner presents 'good cause' to do so."). A habeas petitioner may satisfy the "good cause" standard by setting forth specific factual allegations which, if fully developed, would entitle him or her to the writ. *See Harris*, 394 U.S. at 300; *see also Lave v. Dretke*, 416 F.3d 372, 380 (5th Cir. 2005). The burden rests upon the petitioner to demonstrate that the sought-after information is pertinent and that there is good cause for its production. R. 6(b) R. Gov. § 2254 Cases; *Williams v. Bagley*, 380 F.3d 932, 974 (6th Cir. 2004); *Murphy v. Johnson*, 205 F.3d 809, 814-15 (5th Cir. 2000).

We review the District Court's denial of a discovery request for abuse of discretion. *Smith v. Mahoney*, 611 F.3d 978, 997 (9th Cir. 2010); *Teti v. Bender*, 507 F.3d 50, 60 (1st Cir. 2007); *Williams*, 380 F.3d at 974; *United States v. Roane*, 378 F.3d 382, 403 (4th Cir. 2004); *Newton v. Kemna*, 354 F.3d 776, 783 (8th Cir. 2004); *see also Bracy*, 520 U.S. at 909. A district court abuses its discretion when discovery is "'essential for the habeas petitioner to develop fully his underlying claim.'" *Mahoney*, 611 F.3d at 997 (quoting *Dung The Pham v. Terhune*, 400 F.3d 740, 743 (9th Cir. 2005)).

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The PCRA court afforded Williams considerable latitude to develop the facts underlying his *Batson* challenge during collateral proceedings. Williams was granted a six-day evidentiary hearing; he called Foulkes to the stand and conducted an extensive examination; he was provided with a one-page document, created by Foulkes, summarizing her concerns with each of the venire members that she struck; and he was given several pages of the trial court's voir dire-related notes. What is more, although Williams was not supplied with Foulkes' handwritten voir dire notes, he was expressly permitted to question the prosecutor regarding that which she recorded in those notes.

On direct examination, Foulkes described the content of her handwritten notes as follows:

> I took notes with respect to each individual prospective venire person as they came up and as they spoke. My process of thinking requires contemporaneously writing. It's just something that I do. And what I wrote down were principally what it was that they said. It's that simple. If there was something overtly extraordinary about the witness that I observed, I would also write that down, but not always, and that was not always necessary, and whatever I didn't write down would also be reflected on the record.

Foulkes later explained that she "mostly wrote down things like location, age, whether they had children, where

they worked, the things that we ask in voir dire routinely." Thus, according to Foulkes, much of what she recorded in her notes was also reflected in the record; in other words, the information was readily available for Williams to use as he mounted his collateral attack.

When Williams queried whether Foulkes recorded each prospective juror's race, the prosecutor replied that she generally did not, stating

> No, I don't believe I did. I would record both black and white jurors in the couple of occasions that I recorded race at all. I recorded them more or less equally for black and white jurors, and I don't think I did it beyond the first few prospective jurors, and then I just stopped doing it. It wasn't necessary, certainly, to do it.

Of course, the PCRA judge heard Foulkes' testimony and her description of the notes' contents. When he later examined the notes *in camera*, he was aware of the prosecutor's representations, as well as Williams' specific concerns regarding the veracity of those representations. Yet, the court stated on the record that it found "nothing [in the notes] that needs to be supplied to defense counsel or to be made part of the record." Furthermore, the court characterized Foulkes' testimony regarding her notes as "full" and "complete," and ruled that "no further discovery is warranted."[13]

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13. Prior to the PCRA court's *in camera* review, Williams' counsel made several oral requests for production of the notes.

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Williams now essentially asks that we disbelieve the PCRA court, yet he presents us with no fact-based reason to do so. Instead, he argues that the notes are imperative so that he may inquire into the prosecutor's state of mind. His argument proceeds as if he has never had such an opportunity. But Williams has subjected Foulkes to cross examination on precisely this point. He has also discovered a summary compilation of the motives underlying her strikes. The PCRA judge compared this summary, *in camera*, to Foulkes' raw notes, and pronounced it a "full" and "complete" disclosure. Thus, Williams has already been afforded significant opportunity to discover the prosecutor's state of mind; he fails to set forth, in a colorable manner, exactly what he lacks.

His arguments in favor of production were clear and well stated. Foremost, he was concerned that Foulkes was not disclosing the complete contents of the notes. Thus, counsel argued, "I should not be in a position, with all due respect to the witness and her high office, of taking her word for it. She's got notes; I should be allowed to look at her notes. She's just like any other witness. And I can't--as my client's attorney, I'm charged with a responsibility to not take her word for it. My job is to get the notes so I can check the veracity of her answers, and that's why I've sought the notes." Counsel was also interested in evidence of Foulkes' thought process. He argued, "She may have a pattern of what she recorded that could reflect what she thought at the time she exercised her strikes." Both of these contentions were proffered directly prior to the PCRA court's *in camera* review. When the PCRA court subsequently described the testimony as "full" and "complete," it was implicitly indicating that Foulkes testified truthfully about the notes' contents and that they contained no relevant, undisclosed indicator of her subjective motivation.

Ultimately, Williams' request amounts to an entreaty to engage in a fishing expedition. The law is clear, however, that such speculative discovery requests should be rejected. *See Murphy*, 205 F.3d at 814 ("Simply put, Rule 6 does not authorize fishing expeditions."); *see also Mayberry v. Petsock*, 821 F.2d 179, 185 (3d Cir. 1987). The District Court reviewed the record of collateral proceedings, remarked upon the significance of both the PCRA court's *in camera* review and subsequent characterization of the notes, and ruled that Williams "received all the information he is constitutionally entitled to in order to proceed with his *Batson* claim." The District Court did not abuse its discretion in reaching this conclusion.[14] *See Mahoney*, 611 F.3d at 997 (stating that a district court abuses its discretion when it denies discovery that is essential to development of the petitioner's claim).

In addition, the District Court did not abuse its discretion by denying Williams' motion for an evidentiary

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14. The District Court incorrectly applied 28 U.S.C. § 2254(d) to Williams' request for production, holding that the PCRA court's "refusal to turn over the notes was not contrary to or an unreasonable application of clearly established federal law," and that the decision was "not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." Section 2254(d) applies only to a "substantive request for habeas relief" and not a discovery request. *Fahy v. Horn*, 516 F.3d 169, 180 (3d Cir. 2008). Application of § 2254(d) to a habeas discovery request surely imposes an overly stringent burden, one that a petitioner is unlikely to meet. The District Court's error is not fatal, however, for we exercise plenary review over the Court's legal conclusions, see *Lewis*, 581 F.3d at 100, and ultimately reach the same result under Rule 6.

hearing. District courts have discretion to grant such hearings under § 2254(e)(2). *Palmer v. Hendricks*, 592 F.3d 386, 393 (3d Cir. 2010); *Campbell v. Vaughn*, 209 F.3d 280, 287 (3d Cir. 2000). We have set forth two considerations to guide a district court when confronted with such requests: first, it "should determine whether the petition presents a prima facie showing which, if proven, would enable the petitioner to prevail on the merits of the asserted claim," and second, even if the petitioner satisfies this first criterion, the court "may decline to convene an evidentiary hearing if the factual allegations are 'contravened by the existing record.'"[15] *Palmer*, 592 F.3d at 393 (quoting *Schriro*, 550 U.S. at 474); *see also Morris v. Beard*, 633 F.3d 185, 2011 U.S. App. LEXIS 1551, at *28 (3d Cir. Jan. 26, 2011) ("'[I]f the record refutes the applicant's factual allegations or otherwise precludes habeas relief,' no evidentiary hearing is required." (quoting *Schriro*, 550 U.S. at 474)). Moreover, we have stressed that "courts [should] focus on whether a new evidentiary hearing would be meaningful, in that a new hearing would have the potential to advance the petitioner's claim." *Campbell*, 209 F.3d at 287.

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15. "Under § 2254(e)(2), 'a habeas court is barred from holding an evidentiary hearing unless the petitioner was diligent in his attempt to develop a factual basis for his claim in the state court.'" *Morris v. Beard*, 633 F.3d 185, 2011 U.S. App. LEXIS 1551, at *19 (3d Cir. Jan. 26, 2011) (quoting *Palmer v. Hendricks*, 592 F.3d 386, 392 (3d Cir. 2010)). Williams diligently pursued--and obtained--an evidentiary hearing in the PCRA court, during which his Batson claim was explored in detail. He is therefore not barred from seeking an evidentiary hearing in federal court.

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The District Court held that an evidentiary hearing would not advance Williams' *Batson* inquiry. Williams was afforded a full and complete hearing in the PCRA court. He was provided with the trial court's voir dire notes, as well as a document summarizing the motivation for each of the Commonwealth's peremptory strikes. The prosecutor appeared for several hours of testimony, almost all of which centered upon her voir dire strategy and state of mind. She proffered an explanation for each of her challenges and supported most of these explanations by reference to the record. The racial composition of the venire and jury was clearly established. In short, the PCRA proceeding was comprehensive. Williams identifies no potential facts which a second evidentiary hearing is likely to unearth. The District Court quite accurately observed that "[n] o additional, relevant information would be gained from a federal hearing that cannot be gleaned from the state court record." We agree. *See Morris*, 633 F.3d 185, 2011 U.S. App. LEXIS 1551, at *29- 30 (explaining that an evidentiary hearing is warranted only if there are "critical issues of material fact" that remain unresolved). The District Court's rejection of Williams' discovery requests will be affirmed.

2 Application of the *Uderra* Rule

On collateral appeal, the Pennsylvania Supreme Court determined that Williams waived his *Batson* claim because, as a matter of fact, "trial counsel did not raise a Batson objection during voir dire." *Williams II*, 863 A.2d at 514. This was an unreasonable determination of facts in light of the evidence presented in the state court

proceeding. The trial record is plain--and both parties agree--that Williams objected after the Commonwealth used its second peremptory challenge to dismiss an African American venireperson. Williams objected a second time after Foulkes exercised her fourth strike. Thus, the Pennsylvania Supreme Court's fact-finding is clearly contradicted by the record. As a result of its mistake of fact, the Court did not address the *Batson* claim on its merits.

The Pennsylvania Supreme Court did, however, indirectly address the *Batson* claim through its ineffective assistance inquiry. Specifically, Williams argued that trial counsel was ineffective for failing to insist that the Commonwealth provide race-neutral reasons for its challenges, and that appellate counsel was ineffective for neglecting to raise a *Batson* challenge on direct appeal. To assess the ineffective assistance claims, the Supreme Court queried whether Williams' underlying *Batson* challenge was meritorious. It ultimately answered in the negative after applying its then-recent precedent, *Commonwealth v. Uderra*, 580 Pa. 492, 862 A.2d 74 (Pa. 2004). *Uderra* held that when a postconviction petitioner fails to raise an adequate Batson challenge at trial, he or she is not entitled to rely upon *Batson*'s burden-shifting framework in a collateral attack; rather, the petitioner must prove actual, purposeful discrimination by a preponderance of the evidence. *Uderra*, 862 A.2d at 86-87. In Williams' case, the Pennsylvania Supreme Court held that the evidence did not meet the threshold mandated by *Uderra*. The court thus determined that the underlying Batson challenge lacked merit and, accordingly, rejected

both ineffective assistance claims. *Williams II*, 863 A.2d at 514-15. Neither ineffective assistance claim is before us today.

The Commonwealth argues that the Pennsylvania Supreme Court's application of the *Uderra* rule is reasonable and must therefore guide our inquiry into the merits of Williams' *Batson* challenge. In other words, the Commonwealth argues that we should not apply the three-step *Batson* framework, but should instead simply ask whether Williams proved racial discrimination by a preponderance of the evidence. We disagree. As explained above, the Pennsylvania Supreme Court determined that Williams waived his *Batson* claim; thus, it did not apply *Uderra* to the claim. In fact, it did not address the claim at all. *See Laird v. Horn*, 414 F.3d 419, 424 (3d Cir. 2005) (critiquing contention that a state court implicitly addresses the merits of a claim when it rules on a derivative ineffective assistance of counsel claim). What is more, the Pennsylvania Supreme Court's waiver holding is premised on an unreasonable determination of facts, namely: the faulty finding that Williams failed to raise a *Batson* objection during voir dire. Given these circumstances, we need not assess the appropriateness of the *Uderra* rule, nor will we express an opinion on whether it represents an unreasonable application of *Batson*. We now turn to the merits of this equal protection challenge.

3 *Batson* Merits

The PCRA court denied Williams' *Batson* claim on the merits: it held that there was insufficient evidence

from which to infer that the Commonwealth exercised its peremptory challenges in a racially discriminatory manner. As noted above, the Pennsylvania Supreme Court did not address this substantive determination, but instead resolved Williams' *Batson* claim on procedural grounds. The Supreme Court's procedural resolution is the only decision entitled to preclusive effect. *See Thomas*, 570 F.3d at 115. Thus, for purposes of AEDPA, the Pennsylvania state courts have not adjudicated the *Batson* claim on the merits. *See id.* at 114-15; *see also Lewis*, 581 F.3d at 100 (explaining that when a state court's final resolution of a claim is based on procedural grounds, that claim has not been "adjudicated on the merits" for purposes of § 2254(d)). No AEDPA deference is due by this Court.[16] *Lewis*, 581 F.3d at 100.

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16. The District Court incorrectly afforded AEDPA deference to the PCRA court's substantive resolution of the *Batson* claim. The District Court concluded that, although the Pennsylvania Supreme Court did not adjudicate the claim on the merits, the state courts-- in this case, the PCRA court--had resolved the claim on substantive grounds, and thus there was an "adjudication on the merits" under § 2254(d). An "adjudication on the merits" can, of course, occur at any level of the state courts. *See Thomas v. Horn*, 570 F.3d 105, 115 (3d Cir. 2009). When the state supreme court finally resolves a claim on procedural grounds, however, the substantive determination of a lower state court is stripped of its preclusive effect. *Id.* A substantive determination that lacks preclusive effect is not an "adjudication on the merits." Id. at 114 (explaining that an "adjudication on the merits" is "a decision finally resolving the parties' claims, with res judicata effect, that is based on the substance of the claim advanced, rather than on a procedural, or other, ground" (quoting *Sellan v. Kuhlman*, 261 F.3d 303, 311 (2d Cir. 2001))). As a result, the PCRA court's *Batson* ruling was not an "adjudication on the merits."

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A *Batson* challenge presents a mixed question of law and fact on federal habeas review. *Hardcastle*, 368 F.3d at 254; *Holloway v. Horn*, 355 F.3d 707, 719 (3d Cir. 2004). When AEDPA deference does not apply, we review a mixed question of law and fact de novo. *Lewis*, 581 F.3d at 100. However, any of the state courts' pure factual determinations, whether explicit or implicit, retain the presumption of correctness mandated by AEDPA. *See id.*; *see also* § 2254(e)(1); *Simmons v. Beard*, 590 F.3d 223, 231 (3d Cir. 2009). Batson announced a three-step burden-shifting framework for judges to employ in order to determine whether racial discrimination is at work in jury selection. That procedure, which we have set forth above, requires a defendant to make out a prima facie case of purposeful discrimination before the prosecutor must articulate race-neutral justifications for her strikes. *Miller-El*, 537 U.S. at 328 (citing *Batson*, 476 U.S. at 96-98). After the parties have satisfied their respective burdens of production in these first two steps, the defendant must prove purposeful discrimination by a preponderance of the evidence. *See id.* at 328-29 (citing *Batson*, 476 U.S. at 98).

Establishment of a prima facie case requires the defendant to show that "the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Johnson v. California*, 545 U.S. 162, 168, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005) (quoting Batson, 476 U.S. at 93-94). This step is not intended to be particularly onerous, and "the defendant is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate." *Abu-Jamal v. Horn*, 520 F.3d

272, 288 (3d Cir. 2008) (quoting *Batson*, 476 U.S. at 96). That said, we have emphasized that "peremptory strikes are presumptively valid" and "need not be supported by any reason" so long as they are not "exercised on an unconstitutional basis, such as race or gender." *United States v. DeJesus*, 347 F.3d 500, 505 (3d Cir. 2003).

The Supreme Court has identified at least two examples of circumstances relevant to step one's totality inquiry. First, the defendant may proffer evidence that the government exercised a "'pattern' of strikes against black jurors included in the particular venire, [which] might [then] give rise to an inference of discrimination." *Batson*, 476 U.S. at 97. Second, "the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose."[17] *Id.* In the instant matter, the venire was 39% African American. The Commonwealth exercised a total of sixteen peremptory challenges; fourteen of those were used to remove African American members of the venire. Thus, the prosecutor struck African Americans at a rate of 87.5%, but struck white venirepersons at a rate of 12.5%. The District Court called this pattern "stark" and held that these statistics alone were sufficient to make out a prima facie case. That ruling is consistent with our precedents.

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17. Jurisprudence in this circuit has "identified several additional relevant factors, including how many members of the cognizable racial group are in the venire panel; the nature of the crime; and the race of the defendant and the victim." *Lewis*, 581 F.3d at 103 (internal quotations omitted).

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Statistical evidence may be sufficient by itself to make out a prima facie case of racial discrimination. *See, e.g.*, *Jones v. Ryan*, 987 F.2d 960, 971 (3d Cir. 1993); *Overton v. Newton*, 295 F.3d 270, 278 & n.9 (2d Cir. 2002) (citing cases and stating "statistics, alone and without more, can, in appropriate circumstances, be sufficient to establish the requisite *prima facie* showing under *Batson*"). In *Holloway v. Horn*, we had "little difficulty" finding a prima facie case when the prosecutor used eleven of twelve strikes to remove African American venirepersons. 355 F.3d at 722. Similarly, we found a prima facie showing in *Brinson v. Vaughn*, where the Commonwealth used thirteen of its fourteen strikes to remove African Americans. 398 F.3d 225, 234-35 (3d Cir. 2005). Additionally, our decision in *Hardcastle v. Horn* strongly implies that a prosecutor who removes twelve of fourteen African American venire members exhibits a pattern of strikes sufficient to raise an improper inference. *See* 368 F.3d at 256.

In each of these decisions, however, we were unable to fully reconstruct the racial composition of the venire. Reconstruction of the venire often provides crucial context to a prosecutor's strike rate. *See Abu-Jamal*, 520 F.3d at 291-92. For example, a strike rate of 90% looks less stark when the venire is 90% African American. When the record does not illuminate the composition of the venire, there may be insufficient evidence with which to mount a successful collateral attack. Indeed, we rejected the petitioner's challenge in *Abu-Jamal* when he established that ten of the prosecutor's fifteen peremptory strikes were used to remove African Americans, but was unable to reconstruct the composition of the venire. *See id.* at 291-92.

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What is telling about *Holloway*, *Brinson*, and *Hardcastle*--in contrast to *Abu-Jamal*--is that the pattern of strikes in these cases was sufficient to satisfy the prima facie threshold even without evidence of the venire's racial makeup. In each case, the strike rate exceeded 85%, whereas the rate in *Abu-Jamal* was 66.7%. Here, the strike rate also exceeded 85%; consistent with *Holloway*, *Brinson*, and *Hardcastle*, we find that evidence of the strike rate alone satisfies Williams' prima facie showing. After all, the Commonwealth exercised fourteen of its sixteen peremptory challenges on African Americans. In a venire that was less than 40% black, it is hardly a leap to conclude that a strike rate of 87.5% raises an inference of discrimination.

Although the strike rate data is sufficient by itself to make a prima facie showing in this case, we need not rely exclusively on the Commonwealth's strike rate. Evidence contrasting the rate at which the prosecution accepts black and white jurors may also raise an inference of discrimination. In *Bond v. Beard*, 539 F.3d 256 (3d Cir. 2008), the prosecutor accepted between 41% and 47% of the black venirepersons that he had the opportunity to strike; his acceptance rate for white members of the venire was 83%. We held that the disparity between these acceptance rates was sufficient to make out a prima facie case at step one of the *Batson* analysis. *Bond*, 539 F.3d at 270. In this case, Foulkes accepted five of the nineteen African Americans she had the opportunity to strike. Her acceptance rate was thus 26.3%. By contrast, she accepted nineteen of the twenty-one white venirepersons she had the opportunity to strike. Her acceptance rate for white

venire members was therefore 90%. Under *Bond*, this disparity raises an inference of discrimination.

In sum, Williams has proffered statistical evidence sufficient to suggest that the Commonwealth's peremptory challenges were based upon an improper motive. We must therefore proceed to step two and three of the *Batson* inquiry. The government's burden of production at step two is "relatively low," *Hardcastle*, 368 F.3d at 257; "[u]nless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral," *Purkett v. Elem*, 514 U.S. 765, 768, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995) (per curiam) (quoting *Hernandez v. New York*, 500 U.S. 352, 360, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991)). At the PCRA hearing, Foulkes provided an explanation for each of her strikes. Williams does not contend that any of Foulkes' reasons were facially illegitimate. Nonetheless, we have reviewed the record and conclude that the proffered reasons, some of which are discussed in more detail below, are facially race-neutral. The burden therefore rests upon Williams to prove that the explanations offered by Foulkes are not persuasive and are instead pretextual. *See Miller-El*, 537 U.S. at 338-39 (stating that step three of the Batson framework centers upon "the persuasiveness of the prosecutor's justification").

At step three of the *Batson* analysis, the petitioner must show that "it is more likely than not that the prosecutor struck at least one juror because of race." *Bond*, 539 F.3d at 264. To determine whether the petitioner has carried his or her burden, the court must

evaluate "all evidence introduced by each side (including all evidence introduced in the first and second steps) that tends to show that race was or was not the real reason" for each strike. *Hardcastle*, 368 F.3d at 259 (quoting Riley v. Taylor, 277 F.3d 261, 286 (3d Cir. 2001) (en banc)); *see also Snyder v. Louisiana*, 552 U.S. 472, 478, 128 S. Ct. 1203, 170 L. Ed. 2d 175 (2008) (explaining that "all of the circumstances that bear upon the issue of racial animosity must be consulted"). Step three ultimately focuses upon the prosecutor's subjective motivation, which ideally includes an assessment of the demeanor and credibility of the various voir dire participants. *See Snyder*, 552 U.S. at 477 ("Step three of the *Batson* inquiry involves an evaluation of the prosecutor's credibility, and the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenges." (alteration in original) (internal citations and quotation marks omitted)). To the extent that such assessments factor into the court's final ruling, they must be accorded significant deference on appeal. *See id.* at 477; *DeJesus*, 347 F.3d at 507.

As we have stated, the PCRA court made no step-three findings. The parties nonetheless developed a significant record at the PCRA hearing and, while this is a very imperfect substitute for a trial judge's findings of fact, it permits sufficient--though hardly ideal--collateral review. In the District Court, Williams proceeded by method of comparing stricken members of the venire to individuals the Commonwealth deemed acceptable. We have previously authorized such an evaluative procedure, explaining, "A comparison between a stricken black

juror and a sitting white juror is relevant to determining whether the prosecution's asserted justification for striking the black juror is pretextual." *Riley*, 277 F.3d at 282; *Holloway*, 355 F.3d at 724; *see also Snyder*, 552 U.S. at 479-86 (performing comparative analysis); *Miller-El v. Dretke*, 545 U.S. 231, 241-52, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (finding *Batson* violation based in part on juror comparison). An explanation that appears race neutral at step two may betray an improper motive if it is invoked to strike African Americans but not other non-black venirepersons exhibiting the same characteristic. Williams focuses upon five stricken members of the venire, all of whom were African American. We will confine our comparative inquiry accordingly.

Lucille Dozier. Ms. Dozier was asked whether she had any beliefs which would prevent her "from being able to impose the death penalty in an appropriate case." She answered, "I would have to be absolutely certain, sure that this person really deserves that." After the prosecutor rephrased the question, Dozier stated that she could impose the death penalty if appropriate. At the PCRA hearing, Foulkes testified that she struck Dozier on the basis of her initial hesitancy. Foulkes explained, "[I]t appeared to me from her answers [that it would be] very difficult for her to apply the law in this case."

Williams names two comparators, both of whom were white: Debra Pagano, seated as juror number seven, and Virginia Feo, who was accepted by the Commonwealth but stricken by the defense. When Foulkes asked Pagano whether she would have any difficulty imposing the death

penalty in an appropriate case, Pagano answered, "No." Feo was posed the same question and stated that although it would not be "easy," she "did not think" she would have any difficulty imposing a penalty of death. Neither of these comparators expressed a sentiment close to that exhibited by Dozier; specifically, neither Pagano nor Feo required "absolute certainty" in order to recommend the death penalty. The comparative evidence thus fails to suggest that Foulkes' reason for striking Ms. Dozier was pretext.

Shawn Kimble. Mr. Kimble was employed as a purchasing agent, graduated from Central High School in west Philadelphia, and studied business at Drexel University. Foulkes observed that he was approximately the same age as Williams and, in her opinion, he exhibited a "hostile affect." Foulkes testified that she struck Kimble due to concerns about his attitude, his age, and because Williams asked Kimble no questions during voir dire. Furthermore, Foulkes explained that none of these factors alone moved her to exercise a challenge; rather, it was the combination of concerns that together led to the strike.

Because the PCRA court resolved the *Batson* claim at step one, it did not assess Foulkes' reasons for striking Kimble and, consequently, made no finding with respect to Kimble's alleged hostility. We cannot presume that the PCRA court credited Foulkes' assertion that Kimble displayed a hostile affect. *See Snyder*, 552 U.S. at 479 (declining to credit prosecutor's justification that stricken venireperson was excessively nervous when the state court did not make an on-the-record determination regarding venireperson's demeanor). As a result, we will

not consider the prosecutor's demeanor-based reason for striking Kimble and will instead focus upon Foulkes' remaining justifications: age and the defendant's decision not to question Kimble on voir dire.

Williams attacks these rationales by proffering two comparators to whom Williams posed no questions during voir dire, and who were nonetheless accepted by the Commonwealth. These two individuals--Isabelle Edmonson and Robert Eberle--do not constitute true comparators for purposes of our inquiry. Although Williams did not ask any questions of either Edmonson or Eberle, both were significantly older than the defendant. Therefore, neither can be said to exhibit the same characteristics as Kimble (age *and* lack of questioning). In a comparison analysis, it is insufficient to proffer venire members who lack one or more of the characteristics upon which the prosecutor exercised a strike. This is not to erect an unreasonable roadblock; rather, it ensures accuracy in an area often guided by guesswork and hunches. *See DeJesus*, 347 F.3d at 505 (explaining that a peremptory challenge "is usually based on educated guesses about probabilities based on the limited information available to an attorney about prospective jurors"). Because the focus in step three is to uncover a prosecutor's subjective motivation, it is imperative to account for the complete combination of factors that caused the prosecutor to exercise a strike. Here, it was Kimble's proximity to the defendant's age and the fact that defense counsel asked him no questions. Williams identifies no comparators that meet these criteria; therefore, his comparative evidence is unpersuasive.

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Geraldine Hill. Ms. Hill was a married mother of five living in southwest Philadelphia. During voir dire, Foulkes asked Hill, "would you surrender your belief merely because of the fact that other members of the jury, even a majority of the jury, would believe contrary to what you believe?" Hill replied, "Either way I believe, no one, and I mean no one[,] would change my mind." At the PCRA hearing, Foulkes explained her dismissal of Hill as follows:

> I have to say I can almost remember her saying this, I know that's rather remarkable, but she said that no one would change her mind if she came to a certain conclusion in the jury. Again, the way she put it, the language that she used, was such that it was not sufficient to challenge her for cause, but the emphasis that she gave that response indicated to me that if she came to a conclusion, that she was not someone who was responsive to deliberating further with her fellow jurors. And again, this is something that is a matter of affect and emphasis in the tone of how she delivered her answers.

Williams contends that Hill subsequently clarified her response, and that Foulkes' concerns were thus unreasonable. In particular, Foulkes later asked Hill, "So when you say that you make up your mind and that's it, that doesn't mean that you wouldn't be able to deliberate with your fellow jurors?" Hill answered, "No. You will have to show me where I am wrong, either way. As long as I can be shown."

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There is no question that as a result of Hill's clarification, she could not be stricken for cause. However, Foulkes' lingering concern was not unreasonable. Hill's initial assertion that "no one, and I mean no one[,] would change my mind" is emphatic and suggests that she may have difficulty deliberating with other jurors. This is not to say that she would, in fact, have had difficulty participating in deliberations; but a peremptory strike is often no more than a guess about future behavior, *see DeJesus*, 347 F.3d at 505. A prosecutor--indeed, any trial advocate--has every reason to hedge against empaneling an individual who might prove unduly obstinate. What is more, Williams proffers no comparators for Hill, rendering our post-hoc comparative evaluation of little use. Given the guesswork inherent in the jury selection process, Hill's removal does not suggest improper motives.

Lillie Moore & Dwayne Kitchen. Ms. Moore was married, worked as a keypunch operator, and lived in the Logan section of Philadelphia. Mr. Kitchen was twenty-two, resided in north Philadelphia, and was employed as a construction worker. Foulkes asked both of these venire members whether they would require the Commonwealth to prove Williams' guilt "beyond all doubt." Both answered "Yes."[18] After the prosecutor posed the question to Kitchen, the court interjected: "I don't think that's an appropriate question, and I think that you ought to not ask it anymore." It is undisputed that Foulkes posed a question to several African American and white jurors that used similar "beyond all doubt" phrasing.

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18. Subsequent clarifications by both Moore and Kitchen prevented each from being stricken for cause.

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At the PCRA hearing, Foulkes testified that she struck Moore and Kitchen because it appeared to her that both individuals would "require[] proof beyond all doubt in a serious matter like this." The court pressed Foulkes on her explanation, asking, "[I]f a juror adhered to the fact that they couldn't follow the Court's instructions concerning reasonable doubt, then [wouldn't they] be available to be challenged for cause?" Foulkes indicated that although Moore and Kitchen were rehabilitated to the court's satisfaction, she believed both "were trying very hard to satisfy the Court in their answers, that in their heart [they] really simply couldn't hold the government to a different standard than [certainty beyond all doubt]."

By way of comparison, Williams proffers juror number 176, Gloria Mastronardo. Foulkes did not ask Mastronardo a question using the "beyond all doubt" phrasing; however, Williams argues that Mastronardo's opinions regarding the death penalty are comparable to those Foulkes attributed to Moore and Kitchen. The record does not support such a contention. If anything, Mastronardo expressed views that were somewhat more receptive to imposition of the death penalty. When asked whether she had any beliefs that might prevent her from recommending death, she stated, "I used to think I would *never be against capital punishment* but perhaps--it would depend on the nature of the crime, to be honest" (emphasis added). Foulkes later asked if Mastronardo was capable of "impos[ing] the death penalty." She answered, "I believe so." In short, Mastronardo articulated none of the reservations that Moore and Kitchen expressed. Furthermore, while Foulkes posed an improperly phrased

question to both Moore and Kitchen, she posed similar questions to several other individuals of each race. Williams cannot point to any venireperson who answered the "beyond all doubt" question like Moore and Kitchen, yet who Foulkes failed to strike. We thus find no value in the comparative evidence.

Although Williams' juror-by-juror comparison evidence falls short, we are mindful that we must consider the totality of the available evidence, including that which was proffered at steps one and two of the *Batson* inquiry. *See Hardcastle*, 368 F.3d at 259. Here, Williams presents fairly strong strike-rate evidence: the prosecutor exercised fourteen of sixteen strikes to remove African Americans from a venire that was 39% black. The rate at which she struck African Americans was 87.5%, compared to a strike rate of 12.5% for white venire members. There are also less revealing statistics. The Commonwealth accepted black venire members at a rate of 26.3%. In *Bond v. Beard*, we held that at step three, an acceptance rate of 41-47% (compared to 83% for whites) was "reasonably high," and was evidence that the prosecutor was not racially motivated. 539 F.3d at 270. While the acceptance rate in Williams' case is not equivalent to *Bond*'s, it is much higher than the 9% rate criticized by the Supreme Court in *Miller-El v. Dretke*, 545 U.S. at 240-41. We find the acceptance rate data inconclusive at best.

The statistical data is but one portion of the totality that we must consider at step three. Williams was tried by a jury of five African Americans and seven white individuals. Both defendant and victim were African

American and there was no racial component to the crime. *See Lewis*, 581 F.3d at 103 (explaining that the race of the defendant and victim, and the nature of the crime, may be relevant circumstances to consider); *Abu-Jamal*, 520 F.3d at 288 n.16 (same). These facts cut in the Commonwealth's favor. Furthermore, Williams' comparative evidence was exceedingly weak. Foulkes provided plausible reasons for each of her strikes, and supported her reasons by recourse to the record. More importantly, she was consistent in the application of her reasons; she did not, for example, accept white venire members who articulated a refusal to deliberate or who would require proof beyond all doubt to return a verdict of guilt. On the totality of the record before us, the evidence offered by Williams is simply insufficient to overcome the evidence that favors the Commonwealth.[19] Accordingly, Williams' *Batson* challenge fails on its merits.

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19. Williams makes passing reference to the infamous Jack McMahon training videotape, created in 1987 and featuring former Philadelphia Assistant District Attorney Jack McMahon. In the tape, which was intended as an educational tool for young prosecutors in the Philadelphia District Attorney's Office, McMahon makes several comments suggesting that he made conscious efforts to strike qualified African Americans from the venire. *See Wilson v. Beard*, 426 F.3d 653, 656-58 (3d Cir. 2005) (recounting in detail several of McMahon's more inflammatory comments). Since its public disclosure in 1997, many defendants have sought to bolster a *Batson* claim by recourse to the tape. *See, e.g., Lewis*, 581 F.3d at 104; *Wilson*, 426 F.3d at 653; *Brinson v. Vaughn*, 398 F.3d 225 (3d Cir. 2005). In *Lewis*, we found the tape to be of little significance where the petitioner was unable to show that the district attorney responsible for his prosecution had seen the tape or followed its recommendations. *See* 581 F.3d

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B Accomplice Liability Instructions

Williams' second claim sounds in due process: he contends that the trial court's accomplice liability instructions permitted the jury to find that he was an accomplice to first degree murder without finding that he possessed the specific intent to kill. Intent to kill is an element of first degree murder under Pennsylvania law. 18 Pa. Cons. Stat. § 2502(a). This element must be proved whether the defendant is the principal or merely an accomplice to the homicide. *Everett v. Beard*, 290 F.3d 500, 513 (3d Cir. 2002) (explaining that "since the legislature drafted the law on first-degree murder, Pennsylvania law has clearly required that for an accomplice to be found guilty of first-degree murder, s/he must have intended that the victim be killed" (internal citations omitted)). If, as Williams argues, the charge allowed the jury to find that he was an accomplice to first degree murder without finding that he possessed the *mens rea* required for that offense, then the instructions were constitutionally infirm, for due process requires that each element of the charged offense be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *see also Smith v. Horn*, 120 F.3d 400, 410 (3d Cir. 1997) (holding that petitioner stated a due

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at 104. Similarly here, Williams cannot argue that Foulkes viewed the tape, for it was created at least one year after Williams' trial. There is no evidence that Foulkes was aware of McMahon-like practices which pre-dated the tape's creation or that she utilized such practices in any of her trials, let alone the Norwood murder trial. Thus, we find the tape to be of no significance in the instant matter.

process claim when he successfully argued that the trial court's jury instructions "had the effect of relieving the Commonwealth of its burden of proving beyond a reasonable doubt one of the elements of first-degree murder under Pennsylvania law").

Williams did not object to the accomplice liability instructions at trial, nor did he question this aspect of the charge in post-trial motions to set aside the verdict. He also did not raise the issue on direct appeal or in his PCRA petition. It was not until November 2001, when the collateral proceeding was pending before the Pennsylvania Supreme Court, that Williams filed a motion to remand to the PCRA court so that he might challenge the accomplice liability instructions. The Pennsylvania Supreme Court denied this motion. Williams raised the issue again in a second PCRA petition filed in 2005. The PCRA court dismissed this petition as untimely. *See* 42 Pa. Cons. Stat. § 9545 (requiring any PCRA petition, including a second or subsequent petition, to be filed within one year of the date that judgment becomes final). The Pennsylvania Supreme Court affirmed.

Williams then petitioned the District Court for habeas relief. The District Court held that Williams' claim was not time-barred because the PCRA's one-year statute of limitations was not firmly established and regularly applied at the time the default occurred. The Court proceeded to the merits and rejected Williams' accomplice liability claim. It concluded that even if the charge contained constitutional error, it was harmless in light of the overwhelming evidence adduced at trial.

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We begin by considering whether Williams procedurally defaulted his accomplice liability claim. The Commonwealth argues that the claim was untimely under state law and may not be reviewed by this Court. A federal habeas court cannot review a claim rejected by the state courts "'if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Beard v. Kindler*, U.S. , 130 S. Ct. 612, 614, 175 L. Ed. 2d 417 (2009) (alteration in original) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991)). State procedural rules, such as the PCRA's statute of limitations, are not an adequate bar to federal habeas review unless they were "'firmly established and regularly followed'" at the time the rule was contravened. *Wilson v. Beard*, 589 F.3d 651, 658 (3d Cir. 2009) (quoting *Bronshtein v. Horn*, 404 F.3d 700, 707 (3d Cir. 2005)). Williams ran afoul of the PCRA's statute of limitations when he failed to raise the accomplice liability claim in his initial petition for PCRA relief in 1996. *See Commonwealth v. Albrecht*, 994 A.2d 1091, 1093 n.2 (Pa. 2010). This default occurred well before October 20, 1998, the date by which the PCRA statute of limitations was firmly established and regularly followed. *See Morris*, 633 F.3d 185, 2011 U.S. App. LEXIS 1551, at *12- 13 (explaining that prior to October 20, 1998, Pennsylvania courts "refused to enforce procedural rules--such as the PCRA's one-year statute of limitations--in capital cases"); *Bronshtein*, 404 F.3d at 707-09 (same). Because the procedural rule under which the state courts dismissed Williams' accomplice liability claim was not firmly established and regularly followed at the time of his default, it is an inadequate bar to federal

habeas review. We will therefore proceed to the merits and consider the claim de novo. *See Lewis*, 581 F.3d at 100.

The propriety of the court's charge is closely intertwined with the evidence and argument brought forth at trial. Williams was tried alone. The Commonwealth argued that Williams and Draper perpetrated the killing together. Williams was portrayed as the principal. According to Draper, Williams hatched the plan to rob Norwood and recruited Draper to assist. Once the robbery was complete, it was Williams who decided to kill Norwood. To that end, he retrieved a tire iron and socket wrench with which to bludgeon Norwood's skull. Williams implored Draper to join him in this endeavor, and the two beat Norwood until he was bloody and lifeless. Simply put, Draper's account left no ambiguity regarding Williams' role as the principal in the offense.

This account was consistent with testimony supplied by other Commonwealth witnesses. Williams was seen driving Norwood's vehicle approximately one hour after the murder occurred. He told his friend Rucker that he "offed a guy" named Amos earlier that evening. Rucker observed blood stains on Williams' shoes. Before they parted ways on the night of the murder, Williams told Rucker that he was "going to get some gas from a gas station to go back to the scene of the crime." Police officers later discovered Norwood's body in the cemetery, charred beyond recognition.

The Commonwealth's narrative sharply conflicted with Williams' account. He claimed that on the day

of the murder, he had seen Norwood, Draper, and an acquaintance named Michael Hopkins riding in Norwood's blue Chrysler LeBaron. They apparently pulled up alongside Williams, and Draper indicated that they were headed to Draper's mother's residence on Roumfort Road. Williams asked for a ride because he happened to be going to a party in the same vicinity. When the foursome neared the cemetery, Draper and Hopkins--but not Williams--allegedly assaulted Norwood. Williams stated that he was unaware that his friends intended Norwood any harm. But when they initiated the assault, Williams allegedly became agitated, demanded that Draper and Hopkins abandon their criminal endeavor, and then exited the vehicle when they refused. Williams claimed that he then walked to the residence of an acquaintance and borrowed bus fare to return home. As Williams told it, he was not part of the robbery and was not present when Norwood was killed.

The jury was thus presented with a stark choice: either Williams was the principal in a first degree murder or he was ignorant of his friends' plans and nowhere near the cemetery when the killing occurred. Neither party argued that Williams was an accomplice to robbery or murder. Rather, both the prosecutor and defense counsel stressed their contrasting narratives. Foulkes was blunt: she called Williams "a person who commits atrocious, murderous, malicious acts and then spends the rest of his days lying, covering up, . . . trying to make things seem as they're not." And she emphasized, over and over again, that Williams was a murderer who intended to kill. Defense counsel, by contrast, urged the jury to adopt Williams' version of events and attempted to demonize Draper as a

liar. Several times he succinctly summarized the all-or-nothing proposition facing the jury: "If you believe Mr. Williams, you will acquit him of all charges." Accomplice liability was simply not in play.

In light of these conflicting accounts, the trial court's decision to provide an accomplice liability charge is rather curious.[20] Nevertheless, after charging the jury on the elements of various degrees of murder (and accompanying *mens rea* requirements), voluntary manslaughter, robbery, and criminal conspiracy, the court stated, in pertinent part,

> You may find a defendant guilty of a crime without finding that he personally engaged in the conduct required for commission of that crime or even that he was personally present when the crime was committed.
>
> An accomplice is one who either plans, cooperates, assist[s], counsels or otherwise aids in the perpetration of the crime.
>
> A defendant is guilty of a crime if he is an accomplice of a person who commits that crime. The defendant does not become an accomplice merely by being present at the scene or knowing about the crime. He is an accomplice if, with the

20. During oral argument before the District Court, the parties were asked why the accomplice liability instruction was given. Neither could provide an answer.

> intent of promotion or facilitating commission of the crime, he solicits, commands, encourages or requests the other person to commit it or aids, or agrees to aid or attempts to aid the other person in planning or committing it.
>
> However, a defendant is not an accomplice if before the other person commits the crime, he stops his own efforts to promote or facilitate the commission of the crime, and wholly deprives his previous efforts of effectiveness or gives timely warning to the law enforcement authority or otherwise makes a proper effort to prevent the commission of the crime.
>
> You may find the defendant guilty of a crime on the theory that he was an accomplice as long as you are satisfied beyond a reasonable doubt that the crime was committed, and that the defendant was an accomplice of the person who committed it.

Williams argues that this instruction "unconstitutionally broadened the scope of accomplice liability" because it permitted the jury to find that he was an accomplice to first degree murder without finding that he possessed the specific intent to kill. If the theory of accomplice liability were a viable one in this case, Williams might have a point. But it is not. Accordingly, the trial court's charge reveals no deficiency of constitutional dimension.

Appendix P

To show that a jury instruction violates due process, a habeas petitioner must demonstrate both (1) that the instruction contained "some 'ambiguity, inconsistency, or deficiency,'" and (2) that there was "'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Waddington v. Sarausad*, 555 U.S. 179, 129 S. Ct. 823, 831, 172 L. Ed. 2d 532 (2009) (quoting *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S. Ct. 1830, 158 L. Ed. 2d 701 (2004) and Estelle v. McGuire, 502 U.S. 62, 72, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)). Satisfaction of this two-part inquiry requires a federal habeas court to "focus initially on the specific language challenged," *Smith*, 120 F.3d at 411 (citation and internal quotation marks omitted), and then to review the challenged instruction in the context of the entire charge and in light of the evidence and arguments presented at trial. *Estelle*, 502 U.S. at 72 ("[T]he instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." (quoting *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S. Ct. 396, 38 L. Ed. 2d 368 (1973))); *Waddington*, 555 U.S. 179, 129 S. Ct. at 833 (analyzing accomplice liability charge in light of parties' closing arguments). In this fashion, a due process analysis depends as much on the language of the court's charge as it does on the particularities of a given case. In other words, the inquiry requires careful consideration of each trial's unique facts, the narratives presented by the parties, the arguments counsel delivered to the jurors before they retired to deliberate, and the charge as a whole. *See Waddington*, 555 U.S. 179, 129 S. Ct. at 831-33; *Estelle*, 502 U.S. at 72.

Here, even if the trial court's accomplice liability charge was in some respect ambiguous, there is no reasonable likelihood that the jury applied the instruction in a manner that relieved the Commonwealth of its burden of proof with respect to first degree murder. The trial record makes this point plain: all of the evidence and argument indicated either that Williams was the principal killer--with the specific intent to kill--or that he played no role in the robbery and murder. There simply was no viable third option. The charge as a whole reflected this stark choice. The court mentioned the concept of accomplice liability sparsely. Its first degree murder instructions did not mention the concept of accomplice liability at all.[21]

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21. The first degree murder instruction explained that the jury must first determine whether Williams participated in the murder and, if he did so, whether he acted with a *mens rea* sufficient to meet the first degree murder standard:

> If you find the *defendant* guilty of murder; that is, an unlawful killing with malice, you must then determine whether he is guilty of murder of the first degree, murder of the second degree, or murder of the third degree.
>
> Murder of the first degree is a criminal homicide committed with a specific intent to kill... Therefore, in order to find the *defendant* guilty of murder in the first degree, you must find that the killing was a willful, deliberate and premeditated act.

(emphasis added). The prosecutor's closing argument was consistent with these instructions. She repeatedly highlighted evidence of Williams' intent, stating, for example, "That, ladies and gentlemen, is murder in the first degree, because . . . his actions supply the inference that the defendant intended to take life[.]

Instead, the charge (rightly) focused on Williams' actions and mental state. Thus, although the court provided instruction on the theory of accomplice liability, it appears to have done so out of oversight or, perhaps, carelessness. In either event, the mere provision of this stray instruction does not alter the fact that accomplice liability was a theory for which there was no evidentiary support. By including the instruction in the final charge, the court did not violate Williams' right to due process.[22]

Finally, Williams contends that the trial court's instruction was nearly identical to the accomplice liability instruction that we held to be constitutionally deficient in *Laird v. Horn*, 414 F.3d 419 (3d Cir. 2005). In *Laird*, co-defendants Laird and Chester left a bar along with a third individual named Milano. Milano's body was discovered

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. . . [H]e expressed, by his action, a specific intention, above and beyond the robbery, to kill [Norwood], to kill him for the purpose whatever, for whatever purpose." In a due process challenge, a strong consistency between argument and charge makes it more likely that the jury understood the requirements of the law and applied those requirements correctly. *Cf. Smith v. Horn*, 120 F.3d 400, 404-05 (3d Cir. 1997) (finding infirmity when prosecutor urged jury to apply erroneous theory of accomplice liability).

22. Williams suggests that even if provision of the accomplice liability instruction was unnecessary, we must nonetheless acknowledge the fact that the theory was presented to the jury. As such, the jury may have concluded that Williams was an accomplice to first degree murder. On habeas review, we do not deal in "may haves." The appropriate question is whether the outcome proposed by Williams was reasonably likely. *See Waddington v. Sarausad*, 555 U.S. 179, 129 S. Ct. 823, 831-32, 172 L. Ed. 2d 532 (2009). Our answer to this question is a resounding No.

the following evening in a nearby wooded area. Laird and Chester were tried together for, *inter alia*, murder, kidnapping, aggravated assault, false imprisonment, and conspiracy. Both took the stand and admitted that they participated in the kidnapping and were present for Milano's death. *Id.* at 422, 426. Each denied that he intended for Milano to be killed. *Id.* at 422. Laird accused Chester of killing Milano and vice versa. *Id.* at 422, 426. The jury convicted both defendants of an array of offenses, including first degree murder, kidnapping, aggravated assault, and conspiracy.

The trial court in *Laird* provided an accomplice liability instruction that was almost identical to the instruction given in Williams' case, but the similarities between the two proceedings essentially end there. *Laird* was a two-defendant trial wherein both of the accused admitted their participation in some aspect of the crime--i.e., the kidnapping. *See id.* at 426. Neither co-defendant, however, admitted he was an accomplice to the actual homicide. It was therefore imperative for the charge to distinguish between Laird's acknowledged role as an accomplice to kidnapping and his disputed role as accomplice to first degree murder. Yet the trial court failed to make such a distinction, and failed to explain that an accomplice to kidnapping is not necessarily an accomplice to murder. Given the circumstances present in the case, it was incumbent upon the trial court to ensure that the jury understood "that an accomplice for one purpose is [not] an accomplice for all purposes." *Id.* at 427 (quoting *Smith*, 120 F.3d at 414). To put it differently, under the *Laird* charge, the jury reasonably could have concluded

that because Laird was an accomplice to kidnapping, he must also have been an accomplice to murder.

The problem in *Laird* was not the accomplice liability instruction's linguistic imprecision per se. Rather, the instructional ambiguity worked a critical error when viewed in the context of the trial record as a whole. Williams does not acknowledge this aspect of the holding. Instead, he argues that the similarity of both instructions demonstrates constitutional error. But as we indicated above, a rote comparison of the two instructions is insufficient in a due process inquiry. *See Waddington*, 555 U.S. 179, 129 S. Ct. at 831-33; *Estelle*, 502 U.S. at 72. Although the trial judge in *Laird* provided an accomplice liability instruction that was nearly identical to that rendered here, there was a profound difference between each proceeding's evidence, argument, and the charges as a whole. That difference is dispositive. In *Laird*, the ambiguity in the charge, coupled with the balance of pertinent considerations, made it reasonably likely that the jury applied the instruction in a manner which relieved the Commonwealth of its burden of proof. There is no such likelihood here. Williams' testimony--unlike that provided by the co-defendants in *Laird*--attempts to exculpate him completely. Accomplice liability is simply not in play.

In sum, we find that the trial court's accomplice liability instruction was not constitutionally infirm. Williams' arguments to the contrary are without merit.[23]

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23. Williams also claims that both his trial counsel and his counsel on direct appeal were ineffective for neglecting to challenge the accomplice liability instruction. Because this claim

Appendix P

C Ineffective Assistance of Counsel

Williams' final claim invokes the Sixth Amendment right to effective counsel. Under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), criminal defendants are entitled to effective representation at both the guilt and penalty phases of trial. To establish a constitutional violation under *Strickland*, a defendant must demonstrate that counsel's performance was deficient, and that it prejudiced the defense. *Id.* at 687-88. Where a *Strickland* claim is raised on federal habeas review, however, the petitioner must not only show deficient performance and prejudice; in addition, he or she must show that "the state court's rejection of [the] claim of ineffective assistance of counsel was 'contrary to, or involved an unreasonable application of *Strickland*, or it rested 'on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Porter v. McCollum*, U.S. , 130 S. Ct. 447, 452, 175 L. Ed. 2d 398 (2009) (per curiam) (quoting § 2254(d)).

Williams contends that he received deficient legal representation during the trial's penalty phase. Specifically, he claims that Panarella--his trial counsel--failed to conduct a reasonable investigation into his background. Such an inquiry would have revealed extensive evidence of physical and sexual abuse, as well as sundry concerns with Williams' mental health. This evidence, in turn, could

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lacks merit, neither counsel was ineffective for failing to pursue it. *See Premo v. Moore*, U.S. , 131 S. Ct. 733, 741, 178 L. Ed. 2d 649 (2011); *Werts v. Vaughn*, 228 F.3d 178, 203 (3d Cir. 2000).

have been presented to the jury to mitigate the brutality of Williams' offense, or so the argument goes.[24] Panarella instead opted to portray the defendant as a capable young man for whom the crime was but an aberration. He did not present evidence of sexual abuse or mental impairment, and there was only a passing reference to Williams' physically abusive stepfather. The jury evidently rejected Panarella's characterization, for it concluded that there were no circumstances that mitigated the severity of the offense.[25]

Williams raised this ineffective assistance of counsel claim in his petition for PCRA relief. Prior to ruling on the petition, the PCRA court heard several days of testimony. Three mental health experts testified that Williams was psychologically damaged at the time of the offense. At least eight additional witnesses took the stand and

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24. Mitigating circumstances are set forth by statute under Pennsylvania law. *See* 42 Pa. Cons. Stat. § 9711(e). Had Panarella presented the evidence described above, Williams argues that the jury could have found either that he "was under the influence of extreme mental or emotional disturbance," § 9711(e)(2), or that his "capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired," § 9711(e)(3). Williams also contends that the jury could have found that the "catch-all" mitigation provision set forth in § 9711(e)(8) was applicable. *See* § 9711(e)(8) ("Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.").

25. Most notably, the jury did not find that Williams' age was a mitigating factor in the offense. This finding is significant, and we address it in more detail below.

detailed the physical and sexual abuse to which Williams was subjected throughout his youth. Finally, Panarella testified concerning his performance at trial. At the conclusion of these proceedings, the PCRA court denied the ineffective assistance of counsel claim on its merits. The Pennsylvania Supreme Court affirmed, holding that Williams did not meet "his burden of demonstrating there was [a] reasonable probability the presentation of [prior abuse and mental health] evidence would have resulted in a life sentence instead of the death penalty." *Williams II*, 863 A.2d at 521 n. 12.

On federal habeas review, the District Court concluded that Panarella's penalty-phase performance was constitutionally deficient. The Court explained: "Panarella's efforts fell far short of . . . prevailing professional norms, and the explanations he provided during post-trial and PCRA hearings reflected inattention to the penalty phase rather than tactical decision making." On step two of the *Strickland* inquiry, however, the Court concluded that under AEDPA's deferential standard of review, it could not find that Panarella's performance was prejudicial to the defense. Accordingly, the District Court denied Williams' claim. We exercise plenary review over this decision. *See Lewis*, 581 F.3d at 100.

We will not revisit the District Court's determination that Panarella was constitutionally ineffective during the trial's penalty phase. We instead accept this finding for purposes of our present analysis and proceed to the prejudice inquiry. *See Wong v. Belmontes*, U.S. , 130 S. Ct. 383, 386, 175 L. Ed. 2d 328 (2009) (per curiam) (assuming,

for purposes of analysis, that counsel's performance was deficient when prejudice inquiry was dispositive). The Pennsylvania state courts resolved Williams' ineffective assistance claim on the merits; our review of the issue is thus governed by principles of AEDPA deference. *See Lewis*, 581 F.3d at 100. We apply these principles to the holding of the Pennsylvania Supreme Court because it provides "the 'last reasoned decision' of the state courts" on the *Strickland* claim. *Simmons*, 590 F.3d at 231-32 (quoting *Bond*, 539 F.3d at 289-90). Under § 2254, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Harrington v. Richter*, U.S. , 131 S. Ct. 770, 785, 178 L. Ed. 2d 624 (2011). This means that a habeas petitioner "must do more than show that he would have satisfied *Strickland*'s test if his claim were being analyzed in the first instance"; to prevail, the petitioner must demonstrate that the state court "applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Bell v. Cone*, 535 U.S. 685, 698-99, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *see also Harrington* U.S. , 131 S. Ct. at 786 ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S. Ct. 2140, 158 L. Ed. 2d 938 (2004))).

To establish prejudice, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is one "sufficient to undermine

confidence in the outcome." *Id.* The *Strickland* prejudice standard is not "stringent"--it is, in fact, "less demanding than the preponderance standard." *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir. 2001) (quoting *Baker v. Barbo*, 177 F.3d 149, 154 (3d Cir. 1999)); *see also Woodford v. Visciotti*, 537 U.S. 19, 22, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (explaining that *Strickland* "specifically rejected the proposition that the defendant had to prove it more likely than not that the outcome would have been altered"). In a capital case arising from the Pennsylvania state courts, prejudice exists if there is a reasonable probability that, but for counsel's deficient performance, "one juror [would have] voted to impose a sentence of life imprisonment rather than the death penalty." *Bond*, 539 F.3d at 285 (citing 42 Pa. Cons. Stat. § 9711(c)(1)(iv)).

A careful prejudice inquiry requires that we "consider *all* the relevant evidence that the jury would have had before it if [counsel] had pursued [a] different path." *Wong*, U.S. , 130 S. Ct. at 386. This includes evidence that was adduced at trial as well as that which was not presented until postconviction review. *See Porter*, U.S. , 130 S. Ct. at 454. Stated differently, we must reconstruct the record and assess it anew. In so doing, we cannot merely consider the mitigation evidence that went unmentioned in the first instance; we must also take account of the anti-mitigation evidence that the Commonwealth would have presented to rebut the petitioner's mitigation testimony. *See Wong*, U.S , 130 S. Ct. at 390 (stating that "the reviewing court must consider all the evidence--the good and the bad-when evaluating prejudice"). Once we have reconstructed the record, we must "reweigh the evidence in aggravation

against the totality of available mitigation evidence." *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Only then may we ask whether there is a reasonable probability that, but for counsel's ineffectiveness, the result of the proceeding would have been different.

Accordingly, we begin by reconstructing the record. We will then reweigh the totality of the evidence and assess whether Panarella's deficient performance prejudiced the defense.

1 Reconstructing the Record

The trial's penalty phase was a brief affair. For the Commonwealth, assistant district attorney Jeffrey Kolansky took the stand and supplied the basic facts regarding the Dorfman robbery. He stated that the incident occurred on December 24, 1982; that the victims were Don and Hilda Dorfman, aged sixty-nine and sixty-four, respectively; that Williams was sixteen years of age at the time of the offense; that Williams entered the Dorfmans' home carrying a .22 caliber Winchester rifle, pointed it at Mrs. Dorfman and fired it three times above Mr. Dorfman's head; and that Williams was convicted of two counts of first degree robbery, one count of burglary, one count of simple assault, one count of unauthorized use of an automobile, and one count of conspiracy. Next, Philadelphia police detective Lawrence Gerrard provided testimony pertaining to the Hamilton murder. He explained that the incident occurred on January 26, 1984; that Hamilton was stabbed approximately twenty

times; that the murder weapon was left lodged in the back of Hamilton's neck; that Williams was seventeen years of age at the time of the offense; and that Williams was convicted of third degree murder, theft by unlawful taking, and possession of an instrument of a crime. Finally, Philadelphia Quarter Sessions court clerk Margie Frazier described the sentences imposed for each of these offenses.

Williams presented three witnesses: his mother, Patricia Kemp; his girlfriend, Marlene Rogers, and his first cousin, Willie Dino James. Each witness testified to Williams' general good nature and athletic success. In something of an understatement, the Pennsylvania Supreme Court found that this rather generic testimony was "not compelling." *Williams II*, 863 A.2d at 520.

Kemp did provide limited evidence on cross examination regarding her son's childhood abuse. She denied abusing Williams herself--a point she would contradict ten years later at the postconviction proceeding--but she stated that Williams' stepfather, Ernest Kemp, was "abusive to my son." She continued:

> He [Ernest Kemp] didn't care about [Williams]. He accused my son of doing things, having girls in the room. That was a lie.
>
> My son would be asleep at night, and he [Ernest] would be drunk and he would come in and bust in the room and say he [Williams] has somebody in there, and my son had called my job, and I had told Terry to go down to Mom's. That's a

> lady on the street that helped me raise my son, Mrs. Easton, and I would send him down there with her because my husband [Ernest], that I am married to now, yes, was very abusive to Terry, was very nasty to Terry.
>
> He pushed Terry down a flight of steps because Terry was on the phone that I paid for.

Kemp was not asked to elaborate on these statements on redirect examination and no additional abuse testimony was elicited by either party.

In her closing argument, the prosecutor emphasized Williams' prior convictions and his predilection for violence. She underscored that Williams "has taken two lives, two innocent lives of persons who were older and perhaps unable certainly to defend themselves against the violence that he inflicted upon them." According to the Commonwealth, Williams was a violent individual whose behavior would have continued escalating had he not been apprehended.

Panarella's closing focused on his client's youth. He stressed the fact that Williams was only four months past his eighteenth birthday at the time he committed the offense and he explicitly asked the jury to find that age was a circumstance that mitigated Williams' culpability for the crime. Additionally, Panarella argued that Williams' life sentence would be one of extreme hardship; Williams would be deprived of the privileges of fatherhood, and he would be exposed to "all of the brutalities that are

associated with prison life." Panarella concluded by appealing to the jury's sense of justice. He stated, "I ask you to spare Mr. Williams' life. I can say to you that justice is always tempered with mercy but let me say to you that inflicting the death sentence in this case, I believe, is inappropriate."

The jury rejected this plea. It determined that two aggravating circumstances were applicable: (1) the murder occurred during the commission of a felony (robbery), 42 Pa. Cons. Stat. § 9711(d)(6), and (2) Williams had a significant history of felony convictions involving the use or threat of violence, 42 Pa. Cons. Stat. § 9711(d)(9). It also found that Williams was not entitled to any of the statutory mitigating circumstances set forth in 42 Pa. Cons. Stat. § 9711(e), including the provision that accounts for a defendant's age at the time of the offense, § 9711(e)(4). The jury then weighed the aggravating factors and returned a sentence of death.

At the PCRA hearing approximately twelve years later, a very different picture of Williams emerged. No fewer than eight witnesses came forward to describe a childhood plagued by frequent physical and sexual abuse. Kemp testified (in direct contradiction to her penalty phase testimony) that she "would beat Terry very often because he was smart mouthed." When Williams was in the sixth grade, Kemp met her son at school, publicly "beat him like Muhammad Ali," and then threw him down a flight of stairs. One of Williams' teachers, James Villareal, confirmed that Kemp frequently beat her son, often in public when she would retrieve him from school.

Villareal said that Kemp would hit her son "in a fierce way" and typically for no apparent reason.

Kemp was not the only source of Williams' physical abuse. His brother Thomas, some ten years Williams' senior, testified that he physically "disciplined" his younger sibling. He once threw Williams down a flight of stairs and, on a separate occasion, attempted to shoot him with a rifle. Williams' older sister, Theresa, was also beaten on a routine basis by her mother. Kemp enlisted Williams' assistance in this endeavor; on more than one occasion, Williams was told to hold his sister while Kemp beat her with an electrical cord.

Williams was approximately ten years old when Kemp married Ernest Young. Several witnesses described Young as a "drunk" who became physically violent in the throes of intoxication. Kemp said that her husband was "very cruel, very nasty," and that he often "tr[ied] to fight my children." Young typically directed his anger toward his wife; when she was not around, however, he fought with Williams. In order to escape this environment, it was not uncommon for Williams to flee the home and stay with neighbors, sometimes for days on end.

There was also sexual abuse. When Williams was very young, perhaps around the age of six, he was sodomized by a neighbor boy five years his senior. In his early teens, he was repeatedly molested by a teacher. At thirteen, Williams met and began a relationship with Norwood. Norwood was cruel and physically abusive at times; he once allegedly beat Williams with a belt. When Williams

was approximately fifteen, he was attacked by an older male while staying in a boys' home. The assailant held a weapon to Williams' neck and forced him to perform fellatio.[26]

Three mental health experts testified on Williams' behalf. First, Dr. Julie Kessel, a forensic psychiatrist, explained that she conducted a mental health evaluation during a four-hour interview with Williams in 1998. She diagnosed Williams with an array of chronic impairments: major depression with periods of recurrent psychosis and paranoia; post-traumatic stress disorder; polysubstance abuse; and borderline personality disorder. According to Dr. Kessel, each of these conditions was present in 1984. She therefore opined that Williams was suffering from extreme mental or emotional disturbance when he killed Norwood, and that he was substantially impaired in his capacity to appreciate the criminality of his conduct and to conform his actions to the requirements of the law.

The second mental health expert presented by the defense was Dr. Patricia Fleming, a clinical psychologist who interviewed Williams in 1996 for a period of seven hours and administered a battery of psychological tests. Dr. Fleming explained that Williams was "mentally

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26. The Commonwealth assails these allegations of sexual abuse by pointing out that not one of the purported incidents was contemporaneously reported to medical or law enforcement officials. In fact, all of the sexual abuse testimony is based upon statements provided in anticipation of the PCRA hearing. As such, the Commonwealth's point is well taken and we factor it into our prejudice analysis accordingly.

ill"-among other afflictions, he suffered from post-traumatic stress disorder and was extremely passive-aggressive. Williams' personality was marked by its impulsivity; Dr. Fleming repeatedly described him as "rageful" and testified that Williams "tended to keep his anger repressed until it exploded." In the year before he murdered Norwood, Williams' "behavior was out of control" and getting worse. This rage was accompanied by a "high level of paranoia," depressive symptoms, suicidal ideation, and sleep disorder. In sum, Dr. Fleming was of the opinion that Williams killed Norwood under the influence of extreme mental or emotional disturbance, and that at the time of the offense, he was unable to appreciate the criminality of his conduct or conform his conduct to the requirements of the law.

The final mental health expert for the defense was Dr. Ralph Kaufman, a clinical psychiatrist. Dr. Kaufman interviewed Williams on three separate occasions in 1996 for approximately ten hours in total. Dr. Kaufman echoed the findings of Drs. Kessel and Fleming: he stated that Williams exhibited symptoms of depression, suicidal ideation, anxiety, hypervigilance, identity difficulties, and psychotic decompensation. Furthermore, Williams suffered from posttraumatic stress disorder and was prone to impulsivity. As a result of these afflictions, Dr. Kaufman opined that Williams was under the influence of extreme mental or emotional disturbance when he killed Norwood. Dr. Kaufman could not say, however, whether Williams was unable to conform his conduct to the requirements of the law.

Appendix P

These three defense experts were generally consistent in tracing the origins of Williams' mental impairment. All identified recurrent childhood abuse--especially sexual abuse--as a principal cause of Williams' later psychological disorders. There was unanimous agreement that the assault at the boys' home was a "major" or "acute" trauma, one which contributed significantly to the onset of post-traumatic stress disorder. Dr. Fleming testified that it caused Williams to suffer a "psychological breakdown." He began to self-mutilate and to fantasize about suicide. He also started to experience nightmares in which he was sexually assaulted by older men wielding dangerous weapons. Williams developed an intense anger toward males who "he felt were [sexually] interested in him, whether they made advances or not." Dr. Kessel summarized the end result of this abuse: "Every act of sexual behavior with a man would further sort of humiliate him personally and would increase his rage, which he described had been increasing. He has intense rage towards male homosexuals." Dr. Fleming called the boys' home assault "a true break." Afterwards, Williams "couldn't control himself" or contain his anger.

Not every mental health professional agreed with the opinions set forth above. In fact, Williams was subjected to several psychiatric evaluations contemporaneous with his crime spree in the mid-1980s; these evaluators uniformly concluded that Williams was mentally competent and, while perhaps somewhat maladjusted, he was not cognitively impaired. Had these evaluations been presented at the trial's penalty phase--in rebuttal to mitigation testimony offered by Williams--they surely would have bolstered

the Commonwealth's depiction of a mentally competent, calculated murderer. This is not to say that the conclusions in these reports were unassailable. However, the reports dilute the strength of the mental health characterization proffered by Williams at the PCRA hearing, and they therefore constitute important anti-mitigation evidence. We must consider such evidence as part and parcel of the prejudice inquiry. *See Wong*, U.S. , 130 S. Ct. at 390.

On February 27, 1985, Williams was examined by Dr. Edwin Camiel. At the time, then-nineteen-year-old Williams had been incarcerated for eight months on charges that he murdered Norwood. Williams was "obviously anxious and his behavior was characterized by agitation and hand [w]ringing." Williams told Dr. Camiel, "I can't cope with this." He reported a sensation of pressure throughout his body. Dr. Camiel recorded several clinical observations. He stated that Williams "appeared to be developing a paranoid delusional system"; that he could "detect no gross abnormalities in [Williams'] cognitive functioning"; and that Williams' "[j]udgment making capacity appeared to be somewhat impaired and his responses to social judgment questions indicated a tendency to respond impulsively to a stressful situation in a self-centered manner without regard to the consequences of his behavior for others." In Dr. Camiel's opinion, Williams' condition revealed "evidence of a developing Psychotic Disorder of a paranoid type.... This is the first evidence of psychiatric illness in this Defendant and the clinical picture is consistent with a diagnosis of a Schizophreniform Disorder or a briefly active psychosis secondary to the stress of his present incarceration."

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Dr. Camiel's evaluation is notable because it observed the early stages of Williams' psychological difficulties and attributed their onset to circumstances subsequent to Norwood's murder. The report stated that Williams is *developing* a psychotic disorder. It portrays this turn of events as "the first evidence of psychiatric illness in this Defendant." Dr. Camiel explained that this *developing* impairment is consistent with a diagnosis of schizophreniform disorder, which by its very nature connotes a short-term ailment lasting from one to six months.[27] This time frame is important, for it suggests that the disorder described by Dr. Camiel did not manifest itself until *after* Williams killed Norwood. Furthermore, it indicates that eight months after the murder, Dr. Camiel detected no permanent abnormalities in Williams' cognitive function. According to Dr. Camiel, Williams' newfound psychological complications were secondary to "the stress of his present incarceration."[28] Dr. Camiel therefore recommended immediate psychiatric treatment "in order to prevent the progression of symptoms to the development of a full blown psychotic disorder."

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27. Williams' experts acknowledged as much. Dr. Kessel stated that "schizophreniform psychosis [refers to] overt symptoms lasting under six months. . . . If it is longer than six months, we tend to call it schizophrenia." Dr. Fleming agreed, explaining that to be diagnosed with schizophreniform disorder, "the symptoms have to have lasted from one month to six months."

28. Dr. Camiel examined Williams two days after he was convicted of third degree murder for the Hamilton killing. It was also Williams' nineteenth birthday.

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In spite of the apparent discord between the Camiel report and the mental health narrative offered by the defense, Drs. Kessel and Fleming testified that Dr. Camiel's findings were consistent with the opinion that Williams was severely mentally impaired when he committed the crime.[29] Dr. Kessel explained, "The kind of paranoia he's demonstrating [in the Camiel Report] and the anxiety level and his agitation would certainly be consistent with a post-traumatic stress disorder [patient] who has also got an underlying tendency to become psychotic." In Dr. Kessel's view the appearance of the symptoms was simply the latest complication for a longsuffering victim of psychological disorder.

But Dr. Camiel was not the only professional to find Williams mentally competent around the time of the offense. On January 14, 1983, Dr. Anthony Zanni examined Williams in anticipation of his certification hearing for the Dorfman robbery. Williams was sixteen years of age. Dr. Zanni stated that Williams' "contact with reality was good"; he "has never had persecutory delusions"; and he "has never had visual or auditory hallucinations." In addition, Williams' "[i]nsight and judgment are not impaired." Dr. Zanni diagnosed Williams with conduct

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29. Drs. Kessel, Fleming, and Kaufman each criticized aspects of Dr. Camiel's report as well. Dr. Fleming stated that Dr. Camiel "didn't have the luxury . . . of having a lot of background information." Dr. Kessel testified that Dr. Camiel's report was "not particularly in depth." None of the defense doctors agreed that Williams' psychological difficulties were caused by stress related to incarceration. According to Dr. Fleming, the symptoms were too serious to be caused by incarcerative stress.

disorder and concluded that he was certifiable to stand trial as an adult.

Williams was examined again on March 14, 1984 by Dr. Melvin S. Heller. He was eighteen. According to Dr. Heller, Williams "show[ed] no evidence of mental impairment" and was "[w]ithout psychosis." Williams exhibited "no signs of psychotic thought disorder, delusions, hallucinations, inappropriate affect, inadequate attention span or bizarre behavior." Moreover, there was "no indication that [Williams was] operating under any undue mental or emotional stress," and Dr. Heller indicated that Williams' "prospects for community adjustment would appear to be most favorable." Three months after Dr. Heller's evaluation, Williams murdered Norwood. He had killed Hamilton just two months prior. Thus, the Heller report captured Williams in the midst of his crime spree. Its contents are difficult to reconcile with the testimony of Drs. Kessel, Fleming, and Kaufman.

One additional category of anti-mitigation evidence bears consideration: during Williams' certification proceeding in January 1984, approximately ten to fifteen witnesses-- Williams' family and friends--provided testimony portraying Williams' home life as stable, loving, and supportive. Williams was, for example, engaged in "honest" pursuits; he was a football star with pending scholarship offers; he was a "bright young man" with a "wonderful future." Marlene Rogers and Lucille Rogers (mother of Marlene and grandmother of Williams' child), echoed this theme in 1984. Both returned for the PCRA hearing in 1998 and changed their tune, characterizing

Williams' home life as a "terrible situation" permeated by "abusive behavior."

There was additional evidence, contemporaneously provided, suggesting that Williams' home life was not as nightmarish as that which he depicted on collateral review. Williams' mother repeatedly told probation officers that her relationship with her son was "satisfactory." At trial, she flatly denied inflicting any abuse. She certainly never mentioned a single instance of sexual abuse. What is more, Williams himself echoed these sentiments, telling at least one probation officer that "he had a happy childhood," and was "inspired" by his family, neighbors, and coaches. Williams never provided contrary testimony under oath.

To acknowledge testimony portraying Williams' upbringing in a positive light is not to reject the PCRA narrative of lifelong physical and sexual abuse. However, the parade of witnesses who testified at the certification proceeding described Williams' home life very differently than those who appeared at the PCRA hearing. Similarly, the testimony provided by Williams' mother could scarcely have been more contradictory. For purposes of our prejudice inquiry, it is the fact of inconsistency that is important. If nothing else, the Commonwealth could have used the certification testimony to considerable advantage by impeaching the PCRA narrative. The opportunities for attacking the credibility of those who depicted Williams' life of near-constant abuse would have been legion, thereby diluting the effectiveness of the proffered mitigation evidence. Our consideration of the reconstituted record simply cannot ignore such pointed anti-mitigation evidence.

2 Assessing the Evidence

In order to show prejudice, Williams must establish that there is a reasonable probability that but for Panarella's deficient performance, "one juror would have voted for life imprisonment rather than the death penalty." *Bond*, 539 F.3d at 289. Even if he successfully makes such a showing, however, Williams must then demonstrate that the Pennsylvania Supreme Court's contrary holding was unreasonable. *See Harrington*, U.S. , 131 S. Ct. at 786 (stating that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable"). Overcoming this hurdle is no simple undertaking; as the Supreme Court has recently stressed, the "standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Id.* at 788 (quoting *Knowles v. Mirzayance*, U.S. , 129 S. Ct. 1411, 1420, 173 L. Ed. 2d 251 (2009)).

In reviewing Williams' mitigation evidence, the Pennsylvania Supreme Court held that Panarella's failure to present this information at the penalty phase did not prejudice Williams' defense.[30] On federal habeas review,

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30. Williams argues that the Pennsylvania Supreme Court unreasonably applied *Strickland* because it "articulated an incorrect prejudice standard." He is wrong. The Court's opinion twice sets forth its prejudice standard: in the first instance, the Court states that a petitioner cannot prevail on an ineffective assistance claim "where there is no showing that [mitigating] testimony . . . would have been beneficial in terms of altering the outcome of the penalty phase hearing," *Commonwealth v. Williams (Williams II)*, 581 Pa. 57, 863 A.2d 505, 519 (Pa. 2004)

the District Court concluded that the Pennsylvania Supreme Court's decision was not an unreasonable application of Strickland. We agree.

(internal quotation omitted); in the second instance, the Court concluded that "appellant has not met his burden of demonstrating there was [a] reasonable probability the presentation of this evidence would have resulted in a life sentence instead of the death penalty," *id.* at 521 n.12. Both articulations are reasonable under Strickland; the latter parrots language of the decision itself. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Nonetheless, Williams fixates upon the Pennsylvania Supreme Court's lone reference to a petitioner's "heavy" burden when attempting to establish prejudice. *See Williams II*, 863 A.2d at 519 ("Appellant has not met this heavy burden."). Williams argues that by using such a descriptor, the Court actually imposed a burden much more stringent than the "reasonable probability" requirement set forth in *Strickland*. We cannot agree. Although the Pennsylvania Supreme Court's choice of words was imprecise, there is no indication that the Court in fact held Williams to an incorrect prejudice standard. It twice articulated a standard consistent with *Strickland*, and it is clear from the Court's opinion that it did not consider the mitigation evidence to be the least bit persuasive. We find that by describing Williams' burden as "heavy," the Pennsylvania Supreme Court was merely recognizing the difficulty of prevailing on an ineffective assistance of counsel claim. To accept the contrary argument is to disobey "§ 2254(d)'s highly deferential standard for evaluating state-court rulings, which demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) (internal citations and quotation marks omitted). Such "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law," *id.*, and we accordingly reject it.

Appendix P

The mitigation evidence elicited by Williams on collateral review is no doubt sympathetic. It portrays a much more complicated and troubled individual than the one depicted during the trial's penalty phase. But the evidence is not unequivocally mitigating. Some of the evidence is even contradictory. Had Williams offered Drs. Kessel, Fleming, and Kaufman at the penalty phase, the Commonwealth could have countered with an abundance of evidence suggesting that Williams was not mentally ill and that he did not suffer psychological impairment. After all, Williams was examined by at least three professionals in and around the time of Norwood's murder; not one thought him seriously mentally impaired. Dr. Zanni stated that Williams' "[i]nsight and judgment are not impaired"; Dr. Heller reported that Williams "show[ed] no evidence of mental impairment" and was "[w]ithout psychosis." According to Dr. Camiel, Williams' symptoms of psychosis were recent and they appeared after Norwood was murdered and Williams was incarcerated. Not one of these doctors thought Williams was suffering from psychosis on or around the time of the offense; indeed, the record is devoid of contemporaneous evidence of psychological impairment. This final point is critical, for it distinguishes the instant matter from decisions such *Thomas v. Horn*, 570 F.3d 105 (3d Cir. 2009), where evidence that the petitioner was mentally ill at the time of the offense was clear and undisputed. *See id.* at 126 (stating that "the Commonwealth does not dispute that even the most cursory search would have yielded evidence of Thomas' long history of mental illness").

Appendix P

The conflicting nature of the mental health testimony is, in fact, reminiscent of our recent decision in *Lewis v. Horn*, 581 F.3d 92 (3d Cir. 2009). There, we found that evidence purporting to show that petitioner was mentally ill and brain damaged was "in large part contradictory." *Id.* at 112. Evaluations conducted contemporaneous to petitioner's crime revealed a mentally competent young man, while those performed in anticipation of the PCRA proceeding portrayed an individual riddled with psychological difficulty. *Id.* at 112-13. The contradictory nature of the evidence undercut the effectiveness of Lewis' mitigation testimony, and precluded us from overturning the state courts' determination that Lewis was mentally competent at the time of the offense. Williams' mental health evidence is similarly undercut in the instant matter.

Furthermore, even the testimony offered by Williams' mental health experts was not uniformly sympathetic. Drs. Kessel and Fleming spoke of Williams' inner "rage," especially with respect to "males who behaved sexually toward him." Dr. Fleming explained that Williams suppressed this rage "until it exploded." She described him as extremely impulsive, and opined that Williams gave "less consideration to the consequences of his actions than a normal person would." Dr. Kaufman echoed this sentiment, testifying that Williams redirected his inner pain onto others "without regard to the consequences." Such evidence is not necessarily mitigating, even if all three doctors rationalized this conduct by linking it to Williams' post-traumatic stress disorder. Their explanation was obviously insufficient for the Pennsylvania Supreme Court, which found that the mitigating evidence offered

by Drs. Kessel, Fleming, and Kaufman was neutralized by Williams' predilection to "direct[] his hurt onto other people and . . . to respond to stressful situations in a manner without regard to the consequences." *Williams II*, 863 A.2d at 520 (quoting PCRA decision and adopting its findings). The Court therefore rejected the collective opinion that Williams was acting under extreme mental disturbance at the time of the offense and that his capacity to appreciate the criminality of his conduct or to conform it to the requirements of the law was substantially impaired. Given the conflicting evidence of psychological damage, we cannot say that this finding was an unreasonable determination of facts under § 2254(d)(2).

The testimony concerning Williams' home life is also in tension with itself. On the one hand, several witnesses appeared at the PCRA hearing to describe years of physical beatings and sexual molestation. Their narrative was one of serious, long-term abuse. On the other hand, ten to fifteen witnesses took the stand at Williams' certification proceeding and provided a much different characterization. According to this account, provided six months prior to the Norwood murder, Williams' family and friends were loving, supportive, stable, and certainly not abusive. Some of this anti-mitigation evidence was offered by the very witnesses who later described Williams' home life in a negative light. Williams himself described his upbringing in positive terms. He told Dr. Heller (three months before he murdered Norwood) that "his family relationships are close and meaningful." He never acknowledged any physical or sexual abuse in or around the time of the murder. Williams' only statements to the

contrary were elicited ten years after his conviction, in preparation for PCRA review. The contradictory nature of the abuse testimony seriously dilutes its mitigating effect.[31] *See Lewis*, 581 F.3d at 112-13 (remarking that petitioner never acknowledged physical abuse and suggesting that his failure to do so was anti-mitigation evidence).

In addition to the evidence set forth above, we cannot lose sight of the aggravating factors present in this case, which were significant and afforded considerable weight by the state court. The Pennsylvania Supreme Court highlighted the manner in which Williams "planned and

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31. Williams suggests that we should overlook the contradictory nature of the abuse testimony. In support of this assertion, he cites to our recent decision in *Bond v. Beard*, 539 F.3d 256 (3d Cir. 2008). His citation is inapposite. In *Bond*, the petitioner offered evidence during the PCRA proceeding that depicted "an extremely troubled and deprived childhood." *Id.* at 280. Such evidence differed significantly from that offered at the petitioner's trial, where there was general testimony of childhood difficulty but not of anywhere near the magnitude described during postconviction proceedings. *See id.* at 279-81. We found that the mitigation evidence offered during collateral review was highly persuasive and its omission from trial was prejudicial. In *Bond*, however, we explained that the evidence of childhood abuse and neglect "would not contradict earlier testimony, but rather provide details not uncovered by trial counsel at the penalty phase hearing." *Id.* at 291. This is not the case in the present matter; the testimony of Williams' childhood abuse contradicts that set forth at the certification hearing and provided by his mother at the trial's penalty phase. As such, the mitigating effect of the evidence is seriously undercut.

carried out the killing, as well as his subsequent attempts to cover up the murder by burning the body." *Williams II*, 863 A.2d at 520. On top of this, Williams "had a significant history of violent felony convictions," *id.* at 521 n.12; "this was not his first murder," *id.* For the Pennsylvania Supreme Court, the brutal facts of the murder, combined with Williams' criminal history, strongly counseled against a finding of prejudice.

In *Woodford v. Visciotti*, 537 U.S. 19, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002), the United States Supreme Court considered a petition that was in some respects similar to that presented in the instant matter. Visciotti shot and murdered one victim and seriously maimed a second before he was arrested and later convicted of first degree murder. On collateral review in the state courts, Visciotti argued that he received ineffective assistance of counsel during the trial's penalty phase because his attorney failed to present evidence that Visciotti grew up in a "dysfunctional family in which he suffered continual psychological abuse." *Id.* at 26 (internal quotations omitted). This troubled past, in turn, purportedly led to myriad psychological difficulties in Visciotti's adult life. *Id.* The state supreme court rejected Visciotti's petition, concluding that

> the circumstances of the crime (a cold-blooded execution-style killing of one victim and attempted execution-style killing of another, both during the course of a preplanned armed robbery) coupled with the aggravating evidence of prior offenses (the knifing of one man, and

> the stabbing of a pregnant woman as she lay in bed trying to protect her unborn baby) was devastating.

Id. (describing state supreme court decision). These aggravating factors were so severe, the state supreme court concluded, that they completely overwhelmed the evidence proffered in mitigation. Therefore, trial counsel's failure to present the mitigating evidence in the first instance was not prejudicial. *Id.* On federal habeas review, the Ninth Circuit granted the writ, but the Supreme Court reversed. According to the Supreme Court, AEDPA endows the state courts with primary responsibility for weighing aggravating and mitigating factors in a prejudice inquiry. *Id.* at 27. Furthermore, it was not objectively unreasonable for the state supreme court to attribute significant weight to the aggravating circumstances in a situation such as this--the crime was particularly heinous and, more importantly, Visciotti had a pronounced history of violent felony convictions. By downplaying the weight of the aggravating factors, the Ninth Circuit had inappropriately substituted its own judgment for that of the state supreme court. *Id.* at 26-27. *Woodford* makes clear that such second-guessing is unwarranted on federal habeas review.

Woodford's reasoning is particularly apt here. The Pennsylvania Supreme Court found that Williams' brutal crimes and record of violent convictions overwhelmed the evidence proffered in mitigation. The Court took especial note that "this was not [Williams'] first murder conviction," *Williams II*, 863 A.2d at 521 n.12, and it

specifically adopted the reasoning of the PCRA court, which found that the aggravating evidence "outweighed" the mitigating testimony offered by Williams' mental health experts, *see id.* at 520. In other words, the state supreme court concluded that given the nature of the aggravating circumstances, Williams could not meet "his burden of demonstrating there was a reasonable probability [that] the presentation of [mitigating] evidence would have resulted in a life sentence instead of the death penalty." *Id.* at 521 n.12. In light of the totality of the reconstituted record--the nature of the offense and Williams' history as a convicted murderer, as well as the equivocal nature of the mitigation evidence--we cannot say that this determination was unreasonable.

The Pennsylvania Supreme Court's decision is further bolstered by the fact that the jury did not find Williams' youth to be a circumstance that mitigated the severity of the offense. If ever a capital defendant qualified for the mitigating circumstance set forth in 42 Pa. Cons. Stat. § 9711(e)(4), Terrance Williams did. He was four months past his eighteenth birthday. According to Williams' brief, he is one of the youngest men ever placed on Pennsylvania's death row. Williams' trial counsel built his closing argument around his client's youth and begged the jury to find that age was a mitigating factor. But to no avail. The jury's rejection of this mitigation argument is telling; it strongly suggests that the jurors' collective evaluation of Williams' character would have led them to reject other, less clear-cut mitigating evidence. *See, e.g.*, *Wiggins*, 539 U.S. at 535 (indicating that characteristics which reflect the defendant's "moral culpability" are

relevant at the penalty phase); *see also Jermyn*, 266 F.3d at 310 (explaining that at the penalty phase, jury appraises defendant's "moral culpability"). This is but another factor that points away from a finding of prejudice.

In sum, the Pennsylvania Supreme Court found that Williams was not prejudiced by Panarella's failure to present the mitigating evidence set forth in postconviction proceedings. This determination was not an unreasonable application of *Strickland*. In reaching our conclusion, we are mindful of the Supreme Court's recent admonition that "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Harrington*, U.S. , 131 S. Ct. at 786. That "'fairminded jurists could disagree' on the correctness of the state court's decision," is, by itself, a sufficient basis for rejecting federal habeas relief. *Id.* (quoting *Yarborough*, 541 U.S. at 664). The reconstituted record consists of conflicting mental health evaluations, contradictory depictions of Williams' home life, and unequivocal evidence regarding the brutality of the crime and Williams' history of violent offense conduct. *Strickland* was not unreasonably applied on this record. Habeas relief is therefore unwarranted.

IV

In 1986, a Pennsylvania jury convicted Terrance Williams of first degree murder and recommended a sentence of death. Williams' conviction was upheld by the state courts on direct appeal, and his attempts to obtain collateral relief were likewise unavailing. On federal habeas review, the District Court denied Williams'

petition for relief. Today we affirm that judgment for the reasons set forth above. In so doing, we are mindful of the gravity of our decision. We are bound, however, to respect the lawful decisions of the state courts. Thus, twenty-five years after the jury returned its verdict, we deny Williams' request for habeas relief.

APPENDIX Q — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, DATED JANUARY 22, 2009

SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

TERRANCE WILLIAMS,

Appellant.

Submitted September 30, 2008
January 22, 2009

Appeal No. 560 CAP from the Order entered on 11/28/2007 in the Court of Common Pleas, Criminal Division of Philadelphia County dismissing the PCRA petition at No. CP-51-CR-0823621-1984, Keogh, J.

BEFORE: CASTILLE, C.J., and SAYLOR, EAKIN, BAER, TODD, McCAFFERY and GREENSPAN, JJ.

ORDER

PER CURIAM

AND NOW, this 22nd day of January, 2009, the order of the PCRA court is hereby **AFFIRMED**. *See Commonwealth v. Marshall*, 596 Pa. 587, 947 A.2d 714 (2008).

APPENDIX R — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, DATED SEPTEMBER 27, 2006

SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

TERRANCE WILLIAMS,

Appellant.

Submitted August 2, 2006
September 27, 2006

Appeal No. 476 CAP from the Order entered on 5/4/05 in the Court of Common Pleas, Criminal Division of Philadelphia County dismissing PCRA relief at Nos. 2362-2367 August Term 1984.

ORDER

PER CURIAM

AND NOW, this 27th day of September, 2006, the order of the PCRA court is AFFIRMED.

APPENDIX S — OPINION OF THE SUPREME COURT OF PENNSYLVANIA, DATED DECEMBER 22, 2004

SUPREME COURT OF PENNSYLVANIA

No. 247 CAPITAL APPEAL DOCKET

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

TERRANCE WILLIAMS,

Appellant.

June 6, 2000, Submitted
December 22, 2004, Decided

BEFORE: CAPPY, C.J., CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN and BAER, JJ.

OPINION

Justice EAKIN.[1]

Terrance Williams appeals from the order denying his petition for relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541-9546.

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1. This case was reassigned to this author.

Appendix S

On June 11, 1984, appellant and Marc Draper lost their money gambling on a street corner. Appellant left to get money from the victim, Amos Norwood, and returned with $ 10. Later, Norwood drove up to the two. Appellant told Draper they were going to take some money from Norwood, and the three men left in Norwood's car. Appellant directed Norwood to a secluded area where he and Draper forced Norwood out of the car, bound and gagged him, and then took money and other items from him. Appellant, with a tire iron, and Draper, with a wrench, beat Norwood to death and fled. Later that night, appellant returned and burned the body.

On February 3, 1986, a jury convicted appellant of first degree murder, robbery, and conspiracy. After a penalty hearing, the jury found two aggravating circumstances: (1) appellant committed the killing while perpetrating a felony;[2] and (2) appellant had a significant history of felony convictions involving the use or threat of violence to the person.[3] The jury, after considering the mitigating evidence presented,[4] found no mitigating circumstances, and sentenced appellant to death. *See* 42 Pa.C.S. § 9711(c)(iv).

Newly assigned counsel filed post sentence motions, including claims of trial counsel's ineffectiveness. The motions were denied after a hearing; appellant filed a

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2. 42 Pa.C.S. § 9711(d)(6).

3. *Id.*, § 9711(d)(9).

4. Defense counsel presented mitigating evidence of appellant's age at the time of the crime, *id.*, § 9711(e)(4), and appellant's character and record, *id.*, § 9711(e)(8).

direct appeal to this Court, which affirmed the judgment of sentence. *Commonwealth v. Williams*, 524 Pa. 218, 570 A.2d 75 (Pa. 1990).

Appellant filed a *pro se* PCRA petition in 1995; new counsel was appointed and filed an amended petition in 1996. After hearings, argument, and a careful review of the record, the PCRA court denied appellant's petition. New counsel was appointed and this appeal followed.

Appellant raises 23 issues in his brief which have been reordered for ease of discussion:[5]

1. Was trial counsel ineffective for failing to investigate and present significant indicia of appellant's incompetency?

2. Did the Commonwealth use its peremptory strikes in a racially discriminatory manner, thus depriving appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Article I, §§ 1, 9, 13, & 26 of the Pennsylvania Constitution? Was appellant denied a full and fair opportunity to litigate his claim? Were all prior counsel ineffective for failing to litigate this claim?

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5. This Court is aware of the felt need to leave no stone unturned when counsel presents a capital appeal. However, we note that the quality of representation is not measured by the number of issues raised. It is not necessary to raise patently unavailing matters in order to ward off fears of a later finding of ineffectiveness; a good attorney will not disguise and thus weaken good points by camouflaging them in a flurry of makeweight issues which clearly have no merit.

3. Did the prosecutor use false evidence during the guilt phase of the trial? Were all prior counsel ineffective for failing to litigate this claim?

4. Did the prosecution fail to disclose portions of plea agreements with two prosecution witnesses? Were all prior counsel ineffective for failing to litigate this claim?

5. Did the trial court err when it failed to grant a motion for mistrial made after the Commonwealth failed to provide discovery concerning an identification of appellant by the victim's wife? Were all prior counsel ineffective for failing to litigate this claim?

6. Were references to cocaine and to appellant's incarceration contained in letters allegedly written by appellant improperly admitted at trial? Were all prior counsel ineffective for failing to litigate this claim?

7. Did the trial court err when it denied a mistrial motion based upon the Commonwealth's repeated efforts to present testimony concerning appellant's intent to deceive at the time he provided handwriting exemplars? Were all prior counsel ineffective for failing to litigate this claim?

8. Did the trial court err when it denied a motion for mistrial based upon the prosecutor's prejudicial statement made in front of the jury? Were all prior counsel ineffective for failing to litigate this claim?

9. Did the prosecutor make an improper and prejudicial reference to appellant's failure to call witnesses at trial?

Appendix S

Were all prior counsel ineffective for failing to litigate this claim?

10. Were all prior counsel ineffective for failing to litigate the impropriety of the prosecutor's summation in which her personal opinion was expressed concerning the credibility of appellant's testimony?

11. Did the trial court's accomplice instructions, which implied appellant was involved in the commission of the offense when the defense asserted was alibi, violate appellant's right to due process? Were all prior counsel ineffective for failing to litigate this claim?

12. Was trial counsel ineffective at capital sentencing? Were prior counsel ineffective under the same standards for failing to litigate trial counsel's ineffectiveness?

13. Did the application of the "D6" aggravating circumstance to appellant, who the jury may have found guilty as an accomplice, violate the plain meaning of the death penalty statute, and result in the arbitrary and capricious imposition of a death sentence? Were all prior counsel ineffective for failing to litigate this claim?

14. Is Pennsylvania's "significant history" of violent felony convictions aggravating circumstance unconstitutionally vague on its face and as it was applied to appellant? Were all prior counsel ineffective for failing to litigate this claim?

15. Did the constitutional infirmities in appellant's prior conviction result in an arbitrary and capricious finding of

the "significant history" aggravating circumstance? Were all prior counsel ineffective for failing to litigate this claim?

16. Did the prosecutor knowingly use false evidence during the penalty phase? Were all prior counsel ineffective for failing to litigate this claim?

17. Did the prosecutor improperly inject her personal opinion regarding the propriety of the death penalty? Were all prior counsel ineffective for failing to litigate this claim?

18. Is appellant entitled to sentencing phase relief because the trial court's penalty phase jury instruction violated *Mills v. Maryland*? Were all prior counsel ineffective for failing to litigate this claim?

19. Did the trial court's failure to instruct the jury that "life imprisonment" means life without possibility of parole violate appellant's constitutional rights? Were all prior counsel ineffective for failing to litigate this claim?

20. Was appellant's death sentence a product of improper racial discrimination in violation of the Pennsylvania capital sentencing statute, the Pennsylvania Constitution, and the United States Constitution? Were all prior counsel ineffective for failing to litigate this claim?

21. Did the "proportionality review" performed by this Court violate due process and deny appellant meaningful appellate review? Were all prior counsel ineffective for failing to litigate this claim?

22. Were all prior counsel ineffective for failing to litigate the claims raised in this appeal?

23. Is appellant entitled to relief from his conviction and sentence because of the cumulative effect of the errors described herein?

To be entitled to relief under the PCRA, appellant must show, as to each claim, that the allegation of error has not been previously litigated or waived, 42 Pa.C.S. § 9543(a)(3), and that "the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel." *Id.*, § 9543(a)(4). An issue is previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue...." *Id.*, § 9544(a)(2).[6]

Appellant's claim that the trial court's penalty phase jury instruction violated *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988), has been previously litigated on direct appeal. *Mills* requires a death sentence be vacated if there is a substantial probability the trial court's jury instruction could have led reasonable jurors to conclude they could only consider those mitigating factors which they unanimously found

6. Issues 3, 4, 5, 6 and 17 were raised in post trial motions and decided adversely to appellant. However, since the highest court in which appellant was entitled to review as a matter of right has not ruled on the merits of these issues, they are not previously litigated. *See* 42 Pa.C.S. § 9544(a)(2).

to exist. *Id.*, at 384. On direct appeal, this Court relied on *Commonwealth v. Frey*, 520 Pa. 338, 554 A.2d 27 (Pa. 1989), which held where jury instructions stated a unanimous verdict is necessary to impose a death sentence, no further instruction is required regarding the fact that mitigating factors need not be found unanimously, since Pennsylvania's death penalty statute does not require unanimity in establishing mitigating circumstances. *Williams*, at 82. Accordingly, we rejected appellant's *Mills* claim, and he is not entitled to revive it under the PCRA.[7] *See Commonwealth v. Bracey*, 568 Pa. 264, 795 A.2d 935, 939 n.2 (Pa. 2001) (appellant cannot obtain post conviction relief of claims previously litigated on direct appeal by alleging ineffectiveness of prior counsel and presenting new theories of relief).

Appellant's claim that the aggravating factor in § 9711(d)(6) (killing committed during perpetration of felony) was improperly applied to him because he was an accomplice has also been previously litigated. On direct appeal, this Court addressed appellant's argument that this aggravating circumstance did not apply to him "because there was no proof presented that appellant, rather than his co-brutalizer, Draper, landed the fatal blow." *Williams*, at 83. This Court concluded: "This argument, when raised in the context of the penalty stage,

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7. Furthermore, the United States Supreme Court recently held *Mills* does not apply retroactively. *See Beard v. Banks*, 542 U.S. 406, 159 L. Ed. 2d 494, 124 S. Ct. 2504 (2004). Since appellant's trial occurred in 1986, two years prior to *Mills*, the rule in *Mills* does not apply to his case.

does not even reach the level of speciousness; it is simply ludicrous." *Id.* We will not address the same claim, cloaked in a different theory of relief, in the collateral setting.[8]

All except two of appellant's remaining issues assert trial counsel's ineffectiveness during the guilt and penalty phases, as well as appellate counsel's ineffectiveness for failing to raise these issues on direct appeal. Any alleged error during the guilt and penalty phases has been waived because of trial counsel's failure to raise it; however, appellant may still obtain relief for trial counsel's ineffectiveness if he is able to demonstrate appellate counsel was ineffective for failing to pursue the claims. *See Commonwealth v. Rush*, 576 Pa. 3, 838 A.2d 651, 656 (Pa. 2003) (citing *Commonwealth v. McGill*, 574 Pa. 574, 832 A.2d 1014, 1022 (Pa. 2003) (when court is faced with "layered" ineffectiveness claim, only viable ineffectiveness

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8. Appellant contends *Commonwealth v. Lassiter*, 554 Pa. 586, 722 A.2d 657 (Pa. 1998) (plurality), mandates reversal of his death sentence. *Lassiter* held "[§] 9711(d)(6) may not be applied to an accomplice who does not 'commit' the killing in the sense of bringing it to completion or finishing it." *Id.*, at 662. However, aside from the fact *Lassiter* was decided after appellant's judgment of sentence became final, the jury also found appellant had a significant history of violent felony convictions. Thus, another aggravating circumstance, § 9711(d)(9), existed, and no mitigating circumstances were found; the penalty would still have been death. *See Commonwealth v. Christy*, 511 Pa. 490, 515 A.2d 832, 842 (Pa. 1986) (since jury found one aggravating circumstance and no mitigating circumstances, death sentence upheld even though another aggravating circumstance is held invalid) (citing *Commonwealth v. Beasley*, 504 Pa. 485, 475 A.2d 730, 738 (Pa. 1984)); *see also* 42 Pa.C.S. § 9711(c)(1)(iv).

claim is that related to most recent counsel, appellate counsel)).

We set forth the standard for preserving such "layered" ineffectiveness claims in *McGill* and *Rush*:

> In order to preserve a claim of ineffectiveness, a petitioner must "*plead*, in his PCRA petition," that appellate counsel was ineffective for failing to raise all prior counsel's ineffectiveness. Additionally, a petitioner must "*present* argument on, i.e. develop each prong of the *Pierce* test" as to appellate counsel's deficient representation. "Then, and only then, has the petitioner preserved a layered claim of ineffectiveness for the court to review; then, and only then, can the court proceed to determine whether the petitioner has proved his layered claim."

Rush, at 656 (citations and footnote omitted); *see also McGill*, at 1021-23.

The "*Pierce* test" requires appellant to prove, with respect to appellate counsel's performance, that: (1) the underlying claim of trial counsel's ineffectiveness has arguable merit;[9] (2) appellate counsel had no reasonable

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9. An assessment of this prong requires appellant to establish each *Pierce* prong with respect to trial counsel's performance; failure to establish any one of the prongs concerning trial counsel will defeat the entire claim. *Commonwealth v. Basemore*, 560 Pa. 258, 744 A.2d 717, 738 n.23 (Pa. 2000) (citing *Commonwealth v.*

basis for failing to pursue the claim; and (3) but for appellate counsel's ineffectiveness, the result on direct appeal would have differed. *See McGill*, at 1022-23. This "performance and prejudice" test was first enunciated in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), and was recognized in *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (Pa. 1987), as the proper test under the Pennsylvania Constitution. Failure to satisfy any prong of the test will defeat an ineffectiveness claim. *Basemore*, at 738 n.23 (citing *Rollins*, at 441) (ordinarily, post conviction claim of ineffective assistance of counsel may be denied by showing petitioner's evidence fails to meet single one of three prongs for claim).

Appellant has met the pleading requirement with respect to his remaining issues, as he alleges the ineffectiveness of both trial and appellate counsel. In his statement of questions presented, appellant inserts boilerplate ineffectiveness claims into many of his issues, asserting all prior counsel were ineffective for failing to litigate the issue. Appellant also includes a general boilerplate assertion of "all prior counsel's" ineffectiveness as a separate issue. He presents argument concerning his underlying claims of trial counsel's ineffectiveness, thus satisfying the first prong of *Pierce* with respect to appellate counsel. However, he fails to develop the remaining two prongs concerning appellate counsel's

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Rollins, 558 Pa. 532, 738 A.2d 435, 441 (Pa. 1999)). This "merit" prong has been referred to as containing a "nested" argument—trial counsel's performance must be addressed in order to determine whether appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness. *See Rush*, at 656.

stewardship; thus, he has failed to preserve his claims of appellate counsel's ineffectiveness as required by *McGill*.

Where the appellant has established the arguable merit of his underlying claim of trial counsel's ineffectiveness, remand may be warranted for the opportunity to correct his deficient pleading of the remaining two prongs regarding appellate counsel's ineffectiveness. *Rush*, at 657.

> Nevertheless, there is simply no need to remand a PCRA petition when the petitioner has not carried his *Pierce* burden in relation to the underlying claim of trial counsel's ineffectiveness, since even if the petitioner were able to craft a perfectly layered argument in support of his claim, the petitioner's claim would not entitle him to relief.

Id., at 657-58. Thus, we need not remand if appellant has not met his burden of proving his underlying claims of trial counsel's ineffectiveness.

As discussed below, appellant has not demonstrated his entitlement to relief on any of these underlying claims. Since all of appellant's underlying claims of trial counsel's ineffectiveness fail, his claims of appellate counsel's ineffectiveness are necessarily defeated as well. *McGill*, at 1023. Therefore, we need not remand in order for him to develop the remaining two prongs of *Pierce* with respect to appellate counsel. *See Rush*, at 657-58; *McGill*, at 1025.

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Appellant first claims trial counsel was ineffective for failing to raise the issue of his competency to stand trial. Although no separate competency hearing was held, the issue was addressed at appellant's PCRA hearing, in conjunction with his claim that counsel should have presented psychiatric mitigating evidence. The PCRA court reviewed the following evidence: a 1985 presentence psychiatric evaluation, for an unrelated offense, conducted 10 months prior to trial for the instant offense, which stated appellant was competent to proceed to sentencing; a defense expert's testimony that there was not enough information in the presentence report to determine competency, but appellant "may have been" impaired in his ability to assist counsel; another defense expert's testimony that appellant was not chronically psychotic, but that his ability to talk with his attorney about his past was impaired by his post traumatic stress disorder; two defense experts' testimony that appellant suffered no substantial organic impairment; defense counsel's testimony that although appellant had the opportunity to enter a plea bargain and receive a life sentence, appellant insisted he was not guilty and wanted to go to trial; and the entire trial record.

The PCRA court weighed all the evidence before it and concluded the pre-sentence evaluation was most relevant, as it was conducted closest in time to appellant's trial; the current opinions of the defense experts concerning appellant's mental state at trial 12 years ago were, appropriately, afforded less weight. Furthermore, these experts had been retained for the purpose of evaluating appellant's claim that trial counsel

should have presented psychiatric mitigating evidence, not to evaluate appellant's competency to stand trial. Most significantly, the testimony of defense counsel and the trial record revealed that while appellant may have been troubled at the time of his trial, he was not suffering from any mental impairment which would have rendered him unable to understand or participate in the proceedings. *See* 50 P.S. § 7402(a) (person is incompetent to stand trial when he is substantially unable to understand nature or object of proceedings against him or to participate in his own defense). We perceive no abuse of the PCRA court's discretion in making this determination; accordingly, appellant is not entitled relief.

Appellant next claims the prosecutor exercised her peremptory challenges in a racially discriminatory manner, in violation of *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986). Appellant also claims he should have been permitted to view the prosecutor's notes from voir dire, in order to establish his claim of purposeful discrimination. Appellant's claim is a derivative one, raised in the context of ineffective assistance, since trial counsel did not raise a *Batson* objection during voir dire. In *Commonwealth v. Uderra*, 580 Pa. 492, 862 A.2d 74, 2004 Pa. LEXIS 2499 (October 21, 2004), this Court held, "[I]n order to succeed on an unpreserved claim of racial discrimination in jury selection,...a post-conviction petitioner may not rely on a prima facie case under *Batson*, but must prove actual, purposeful discrimination by a preponderance of the evidence,...in addition to all other requirements essential to overcome the waiver of the underlying claim." 862 A.2d at ___, 2004 Pa. LEXIS 2499 at *28-29 (citation omitted).

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Beyond baldly asserting the prosecutor used 14 of 16 peremptory strikes against African-American jurors, appellant has not made the requisite showing. He provides *no information* concerning the race of the jurors who were acceptable to the Commonwealth but stricken by the defense, nor does he provide the racial composition of the final jury. However, the PCRA court noted its own records reflected that, of a possible 20 peremptory challenges, 14 were used against African-Americans, two were used against Caucasians, and four were unused. Furthermore, out of 111 venire persons, 43 were African-American, and the final composition of the jury was five African-Americans and seven Caucasians. Based on these facts, the PCRA court properly concluded appellant had failed to establish he was entitled relief.[10]

Appellant's next claim focuses on the prosecutor's impeachment of defense witness Portie Robinson, who testified on direct examination that his fellow inmate, Marc Draper, had told him someone other than appellant

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10. Appellant asserts the prosecutor's notes were essential to him at the PCRA hearing, because the prosecutor referred to them during her testimony and used them to prepare her testimony, and because they were relevant to the issue of whether she exercised racial bias in selecting the jury. However, the PCRA court permitted appellant to inspect a summary of the prosecutor's notes, from which she testified; appellant does not explain why the summary was an insufficient aid in his cross-examination of the prosecutor, and fails to demonstrate exceptional circumstances existed which required production of the actual notes. 42 Pa.C.S. § 9545(d)(2) ("No discovery, at any stage of proceedings under this subchapter, shall be permitted except upon leave of court with a showing of exceptional circumstances.").

committed the murder with him. To establish Robinson's bias against Draper, the prosecutor attempted to show Draper's father, a police officer, had participated in an investigation which led to Robinson's convictions. When Robinson denied this, the prosecutor presented the rebuttal testimony of the prosecutor from Robinson's trial, who stated he had provided Robinson's attorney with the name of Draper's father.

Appellant contends this rebuttal testimony was false; he argues Draper's father was never listed as a Commonwealth witness. However, the record belies appellant's argument; Draper's father was never called as a witness, so his name was not on the Commonwealth's witness list, but rather was given to defense counsel during an informal conversation, identifying him as one of the investigating officers. N.T. Trial, 1/31/86, at 1522-24. Accordingly, appellant's claim is meritless.

Appellant next claims the prosecutor failed to disclose to appellant, or to the jury, the full terms of co-defendant Marc Draper's plea agreement and the complete criminal history of Commonwealth witness Renee Rucker. Draper received a life sentence in exchange for pleading guilty to second degree murder and agreeing to testify against appellant. Appellant contends there were other charges against Draper arising from a previous robbery he had committed with appellant which the Commonwealth agreed to *nolle pros* in exchange for his testimony. This contention is meritless; other than his own assertion, appellant provides no support for this allegation. The record reveals Draper's full plea agreement was read

into the trial record, and Draper acknowledged it was the full extent of his agreement. N.T. Trial, 1/22/86, at 661-63. Appellant's uncorroborated allegation does not entitle him to relief.

Appellant contends Renee Rucker was not cross-examined concerning her prior *crimen falsi* convictions under a different name. Appellant points to the fact there were two listings for "Renee Rucker" in Philadelphia County's data base, and one listing also had an alias and included four theft convictions. However, appellant acknowledges these two listings have different photo identification numbers, and he fails to show they are actually the same person. Thus, appellant's claim fails.

Appellant's next issue focuses on his identification by the victim's wife, Mamie Norwood. At trial, Mrs. Norwood testified she had seen appellant on her front porch the night of the murder. Appellant contends that, prior to trial, there was no indication this witness could identify him; however, during trial preparation, the prosecutor was informed the witness recognized appellant as the man on her porch, after seeing his picture in the newspapers three or four weeks before trial and then seeing him at the preliminary hearing. Appellant argues the trial court should have granted a mistrial because the defense was not notified of the witness's ability to identify appellant, and was thereby deprived of the opportunity to file a suppression motion.

"A defendant seeking relief from [a] discovery violation must demonstrate prejudice in order to be entitled to a

new trial." *Commonwealth v. Jones*, 542 Pa. 464, 668 A.2d 491, 512 (Pa. 1995) (citation omitted). It appears from the sidebar discussion concerning this issue that the witness's ability to identify appellant was not known to the Commonwealth until one month before trial, when Mrs. Norwood mentioned the photos in the paper while being interviewed by the prosecutor in preparation for trial. *See* N.T. Trial, 1/14/86, at 191-94. The witness's trial testimony reveals she was never asked to identify the man on her porch, and she did not come forward with her recognition of appellant's newspaper photo until after the preliminary hearing. *Id.*, at 129-30. There is no indication this information was deliberately withheld by the Commonwealth, nor has appellant demonstrated he was prejudiced by not being able to move for suppression of this testimony. Nothing in the record warrants the conclusion this identification was obtained by suggestive means or by any other means in violation of appellant's constitutional rights; therefore, a motion to suppress would have been futile. Finally, trial counsel vigorously cross-examined Mrs. Norwood concerning the conditions under which she saw the man on her porch, her initial inability to identify him, and her subsequent identification of appellant as that person. *See id.*, at 117-132, 141-46. Accordingly, appellant has not demonstrated he is entitled to relief.

Appellant's next two issues focus on letters he allegedly wrote to Marc Draper while in prison, in an effort to convince Draper to lie at trial. Appellant argues these letters were improperly admitted into evidence at trial because they contained prejudicial references to drug activity and to appellant's incarceration. He further

argues the trial court should have granted a mistrial based upon the prosecutor's questions to the handwriting expert who identified the letters as having been written by appellant.

With respect to appellant's argument that the letters contained prejudicial references to prior bad acts, it was made clear to the jury that the references to drug activity were merely part of the "story" concocted by appellant in order to disassociate himself from the murder; Marc Draper testified this story was clearly fiction. N.T. Trial, 1/22/86, at 732, 739, 748. Appellant's prison number and address were not redacted from the letters, but the trial court ruled there was no prejudice to appellant by leaving this information on the letters, since "the testimony clearly indicates that the [appellant] was in prison at the time; the inference being that he was awaiting trial on this case...." *Id.*, at 756-57. Appellant's argument that the address revealed he was in state prison instead of county jail, and thus was serving time for a prior murder, is baseless. There was no evidence presented concerning appellant's prior conviction, and the address on the letters did not name the correctional facility or indicate it was a state prison; therefore, appellant's contention that the jury drew this inference is meritless.

Appellant argues the prosecutor's questions to the handwriting expert prejudiced him by suggesting he had tried to disguise his handwriting when he provided samples to the expert. The prosecutor's questions were asked in response to the expert's description of how he is able to detect attempts to alter or disguise one's handwriting;

when the prosecutor asked if the expert could ascertain whether appellant had attempted to disguise his writing, defense counsel objected and the trial court sustained the objection. The expert never answered the prosecutor's questions, and the jury was later instructed counsel's questions do not constitute evidence. N.T. Trial, 2/3/86, at 1790. *See Commonwealth v. LaCava*, 542 Pa. 160, 666 A.2d 221, 231 (Pa. 1995) (it is well established that attorney's questions and statements are not evidence; juries are presumed to follow trial court's instructions). Accordingly, we perceive no prejudice to appellant.

Appellant's next three issues challenge the propriety of statements made by the prosecutor during the guilt phase. Appellant is entitled to a new trial on the basis of prosecutorial misconduct only where the unavoidable effect of the prosecutor's comments was to prejudice the jurors, forming in their minds a fixed bias and hostility toward appellant, such that they were incapable of weighing the evidence objectively and rendering a true verdict. *Id.*, at 231. The prosecutor's comments cannot be viewed in isolation, but must be considered in the context in which they were made. *Commonwealth v. Carpenter*, 533 Pa. 40, 617 A.2d 1263, 1267 (Pa. 1992).

On redirect examination of appellant, defense counsel asked whether he was eligible to return to college that fall, and if he had been planning to return. The prosecutor, knowing this line of questioning would open the door to character evidence, which would permit her to rebut this testimony with evidence of appellant's prior convictions, stated, "Objection, your honor. You know, if we may see you

at sidebar, I think counsel is opening up an area that he, indeed, will regret." N.T. Trial, 1/30/86, at 1392. Appellant argues this remark prejudiced him because the jurors could have inferred there was other damaging evidence against him which they were not allowed to consider. The trial court, however, after overruling the prosecutor's objection and admonishing her not to "characterize anything about what the defense is doing," *id.*, immediately reminded the jurors the remarks of counsel were not evidence and instructed them to disregard the remark. *Id.*, at 1397. Since the jury is presumed to have followed the trial court's instructions, *LaCava*, at 231, appellant has not demonstrated counsel's remark prejudiced him.

Appellant next claims the prosecutor impermissibly commented on his failure to call certain witnesses. During closing, the prosecutor stated:

> Now, ladies and gentlemen, this case is not a case of [trial counsel] against the Commonwealth. Bear in mind that the defendant's resources do not rely exclusively on his attorney. *The defendant's case is the defendant's case, and whatever the defendant has or knows about this event, and if it were truthful, he has his opportunity, through his attorney, to bring in witnesses, to subpoena witnesses*, to do what needs to be done on cross examination to bring out that truth.

N.T. Trial, 2/3/86, at 1660-61 (emphasis added).

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A prosecutor may respond to defense arguments and is free to present her case with logical force and vigor. *Commonwealth v. Koehler*, 558 Pa. 334, 737 A.2d 225, 240 (Pa. 1999). The prosecutor's statements, viewed in the context in which they were made, were proper response to defense counsel's assertion in his closing argument that the defense does not have the "tremendous resources" the prosecution does:

> Generally, I would come before you and say what Terrence Williams has in his defense is [trial counsel]. The Commonwealth, as is their burden, has a tremendous amount of resources that they have available to it in order to build that case. Terrence Williams does not have access. I do not have access to those resources....

Id., at 1627-28. The prosecutor's comments were fair response, and appellant's claim fails.

Appellant next claims the prosecutor, during closing, impermissibly expressed her personal opinion concerning the credibility of his testimony:

> Mar[c] Draper's deal, as it were, is not one of the happiest moments of a prosecutor. Prosecutors don't, generally speaking, like to make deals with murderers; however, I think that a distinction can be made between two persons who commit the same atrocious act, one of whom does everything he can, after committing the act, to right his wrong. Obviously, he can't

> bring the victim back to life but he can do what is necessary to bring all responsible to justice in this case. Compare that with a person who commits atrocious, murderous, malicious acts and then spends the rest of his days lying, covering up, suborning perjury, trying to make things seem as they're not. *I think a distinction can be made in such a case.*

Id., at 1695 (emphasis added). Viewed in context, these statements were not an opinion concerning appellant's credibility; the prosecutor was contrasting the evidence of the Commonwealth's witness, Marc Draper, with that of appellant. Throughout trial, and during closing argument, defense counsel had attacked Draper's credibility; therefore, the prosecutor's comments were fair response. *See Commonwealth v. Miller*, 572 Pa. 623, 819 A.2d 504, 516 (Pa. 2002) (as long as prosecutor does not assert personal opinions, she may comment on witness's credibility, especially when witness's credibility has previously been attacked by defense). Further, the prosecutor was summarizing appellant's actions after the murder; evidence of appellant's attempts to escape responsibility had been presented at trial. The prosecutor's use of the phrase "I think," viewed in context, does not transform her comparison of appellant and Draper into personal opinion. Therefore, appellant's argument is baseless.

Finally, regarding the guilt phase, appellant claims the jury instruction regarding Draper's liability as an accomplice violated appellant's due process rights because

it did not incorporate appellant's alibi defense, thus implying he had admitted complicity in the murder. In reviewing an allegation of an incorrect jury instruction, the charge must be viewed as a whole. *Commonwealth v. Saranchak*, 544 Pa. 158, 675 A.2d 268, 276 (Pa. 1996). Jury instructions will be upheld if they adequately and accurately reflect the law and are sufficient to guide the jury properly in its deliberations. *Commonwealth v. Thompson*, 543 Pa. 634, 674 A.2d 217, 219 (Pa. 1996). Here, the trial court instructed the jury:

> [W]hen a Commonwealth witness was so involved in the crime charged that he was an accomplice, his testimony has to be judged by certain precautionary rules.
>
> * * *
>
> In view of the evidence of Marc Draper's criminal involvement, you must regard him as an accomplice in the crimes charged and apply the special rules to his testimony. These are the special rules that apply in accomplice testimony: First, you should view the testimony of an accomplice with disfavor because it comes from a corrupt and polluted source....

N.T. Trial, 2/3/86, at 1773-74. Viewed in its entirety, the instruction adequately and accurately conveyed to the jury it should view Draper's testimony as coming from a corrupt source; it did not, as appellant contends, imply that because Draper was considered an accomplice, so was

appellant. Furthermore, the jury had just been instructed regarding appellant's alibi defense: "The defendant's evidence that he was not present, either by itself or together with other evidence, may be sufficient to raise a reasonable doubt of his guilt in your mind." *Id.*, at 1772. Accordingly, appellant's claim is meritless.

With respect to the penalty phase, appellant first argues trial counsel was ineffective for failing to investigate and present psychiatric mitigating evidence. Specifically, appellant contends counsel relied only upon appellant's unstable mother to suggest potential mitigation witnesses, and counsel never investigated appellant's records for mental health mitigation evidence. Appellant claims, had trial counsel properly investigated, he would have discovered numerous lay witnesses who would have testified concerning appellant's abusive upbringing and dysfunctional family history; he further claims counsel should have utilized the 1985 presentence psychiatric evaluation of Dr. Edwin Camiel, appellant's prison health records, and transcripts from appellant's previous murder trial. Based on these sources, appellant contends, trial counsel would have learned "appellant's adult mental illness (*e.g.*, his psychosis, anxiety, delusions, paranoia and schizophrenic condition) all resulted from his [post traumatic stress disorder], which itself resulted from his abusive upbringing." Appellant's Brief, at 29.

"[T]his Court has declined to find counsel ineffective for failing to proffer testimony from a mental health professional to establish a mitigating circumstance where there is no showing that such testimony...would have been

beneficial in terms of altering the outcome of the penalty phase hearing." *Commonwealth v. Howard*, 553 Pa. 266, 719 A.2d 233, 238 (Pa. 1998). Appellant has not met this heavy burden.

At the PCRA hearing, appellant presented three mental health experts who testified that, had they seen Dr. Camiel's 1985 evaluation, they would have conducted further investigation concerning appellant's mental health. It is unclear, however, what beneficial information concerning any mental impairment at the time of the murder would have surfaced, given the evaluation's statement that appellant "denied any past psychiatric history." Report of Edwin P. Camiel, M.D., 2/27/85, at 2. While acknowledging appellant's very apparent mental agitation and expressing a concern that appellant was developing a psychotic disorder necessitating treatment, the evaluation clearly notes, "this is the first evidence of psychiatric illness in this Defendant...." *Id.*, at 3. Thus, based on the information in the evaluation, appellant's alleged mental illness surfaced after his incarceration; the evaluation gives no indication of any mental impairment at the time of the murder. Accordingly, trial counsel was not ineffective for failing to rely on this report.

The three mental health experts also testified that, at the time of the murder, appellant was acting under extreme mental disturbance and his capacity to appreciate the criminality of his conduct or to conform it to the requirements of the law was substantially impaired. *See* N.T. PCRA Hearing, 4/8/98, at 106; 4/9/98, at 375, 425; 4/13/98, at 551, 560. However, the PCRA court, weighing

this testimony in context of the entire proceeding, along with the record evidence before it, concluded it was outweighed by testimony from these same experts that appellant "directed his hurt onto other people and that he was likely to respond to stressful situations in a manner without regard to the consequences." PCRA Court Opinion, 1/13/99, at 14. The PCRA court further noted the manner in which appellant planned and carried out the killing, as well as his subsequent attempts to cover up the murder by burning the body. *Id.*, at 15. Accordingly, we perceive no abuse of discretion by the PCRA court in weighing the evidence, and we will not disturb the court's determination. *See Commonwealth v. Abu-Jamal*, 553 Pa. 485, 720 A.2d 79, 93-94 (Pa. 1998) (this Court is bound by PCRA court's credibility determinations where there is record support for those determinations).

At the PCRA hearing, appellant also presented the testimony of several friends and family members concerning his abusive childhood, claiming counsel should have called these witnesses during the penalty phase. It does appear from the record of the penalty proceedings that the three mitigation witnesses counsel presented were not compelling;[11] however, counsel testified at the

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11. The witnesses were: appellant's mother, who testified concerning appellant's athletic accomplishments and only mentioned appellant's abusive upbringing briefly during cross-examination by the prosecutor; appellant's girlfriend, who testified appellant was a good father to their infant daughter and a sweet, honest person; and appellant's cousin, who gave a rambling narrative, peppered with Biblical references, about appellant being pressured by his teammates and getting into fights.

PCRA hearing it was his impression the mitigation witnesses utilized in appellant's first murder trial were not willing to cooperate as witnesses at this, his second. *See* N.T. PCRA Hearing, 4/17/98, at 767, 771-72. Counsel also testified, had he reviewed the presentence reports from appellant's prior trials, he would not have considered the issues of family dysfunction; rather, his tactic was to present appellant as a promising athlete, a well-liked and outgoing young man, for whom these charges were an extreme aberration. *Id.*, at 765. Counsel further testified that towards the end of the guilt phase, he became concerned because "I had asked Mr. Williams for cooperation that [sic] I wasn't getting it." *Id.*, at 791. Based upon this testimony, the PCRA court concluded appellant had not met his burden of demonstrating, had counsel presented such evidence during the penalty phase, there was a reasonable probability appellant would have received a life sentence. We will not disturb the PCRA court's credibility determination, and find no abuse of discretion by the court in this instance. Accordingly, appellant is not entitled relief on this claim.[12]

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12. In his reply brief, appellant points to *Williams v. Taylor*, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000), in which the United States Supreme Court found counsel ineffective for failing to conduct sufficient investigation of potential mitigating circumstances. Appellant contends counsel's preparation in that case was more extensive than that of appellant's counsel, and the high Court still found counsel's performance deficient and prejudicial. However, the mitigating evidence of the defendant's nightmarish childhood in *Williams* was significantly different than that in appellant's case; the neglect and abuse in *Williams* was so extensive as to require the parents' incarceration. Furthermore, as the PCRA court and this Court have concluded, appellant

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The next three issues concern the jury's finding appellant had a "significant history of violent felonies." 42 Pa.C.S. § 9711(d)(9). Appellant argues this aggravating circumstance is unconstitutionally vague on its face; he further contends the prior convictions on which it was based in his case were constitutionally infirm, and that the prosecutor presented false evidence concerning the facts of one of these convictions.

This Court has repeatedly rejected the argument that § 9711(d)(9) is unconstitutionally vague. *See Commonwealth v. Hill*, 542 Pa. 291, 666 A.2d 642 (Pa. 1995); *Commonwealth v. Rivers*, 537 Pa. 394, 644 A.2d 710 (Pa. 1994); *Commonwealth v. Fahy*, 512 Pa. 298, 516 A.2d 689 (Pa. 1986); *Commonwealth v. Goins*, 508 Pa. 270, 495 A.2d 527 (Pa. 1985); *Commonwealth v. Beasley*, 504 Pa. 485, 475 A.2d 730 (Pa. 1984). Appellant presents no compelling reason for us to overturn this line of cases.[13]

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has not met his burden of demonstrating there was reasonable probability the presentation of this evidence would have resulted in a life sentence instead of the death penalty. Appellant had a significant history of violent felony convictions; this was not his first murder conviction. Therefore, we reject appellant's attempt to analogize *Williams*. *See Commonwealth v. Williams*, 577 Pa. 473, 846 A.2d 105 (Pa. 2004) (mitigation evidence would not have had reasonable probability of changing outcome of proceedings, where records were replete with indications of appellant's violent and aggressive history).

13. Appellant attempts to distinguish *Proffitt v. Florida*, 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976), on which this line of cases relied; he argues *Proffitt* involved a challenge to an allegedly vague *mitigating* circumstance. However, as this Court

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The prior convictions used to support this aggravating circumstance were appellant's 1982 conviction for robbery and burglary, and his 1984 murder conviction. Appellant now claims these convictions were obtained in violation of his constitutional rights, and recycles some of his arguments made on direct appeal of these convictions to the Superior Court. However, these convictions were affirmed on direct appeal, and have long since become final. *See, e.g., Commonwealth v. Williams*, No. 03247 Philadelphia 1996, unpublished memorandum (Pa. Super. filed November 12, 1997). Thus, appellant's claim fails.

Furthermore, there is no support for appellant's claim that the prosecutor introduced false testimony concerning the underlying circumstances of the 1982 robbery and burglary. Specifically, appellant claims testimony concerning his holding a rifle to the neck of one victim and firing it over the head of the other victim was false because his demurrer to the weapon possession charge in that case was sustained. However, the record belies appellant's claim; the Superior Court's opinion on direct appeal reveals appellant brandished the rifle and fired it to intimidate the victims. *Id.*, at 3. Accordingly, appellant's claim is baseless.[14]

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noted, *Proffitt* drew no such distinction: "a jury's evaluation of the *aggravating and mitigating* circumstances, as enumerated, requires no more line drawing than is commonly required of a factfinder in any law suit." *Beasley*, at 737 (citing *Proffitt*, at 257) (emphasis added).

14. Further, even if this aggravating circumstance was not applicable to appellant, the jury found another aggravating circumstance, § 9711(d)(6), existed, and no mitigating circumstances were found; the penalty would still have been death. *See* n.8, *supra*.

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Appellant next claims the prosecutor improperly injected her personal opinion regarding the propriety of the death penalty into her closing argument during the penalty phase: "He terrorized, he robbed, he blundered, and he killed, and he continued to kill, and I tell you, ladies and gentlemen, that *if the death penalty doesn't apply to Terrance Williams, I don't know who it would apply to.*" N.T. Trial, 2/3/86, at 1876 (emphasis added).

"During the sentencing phase of a capital case, a prosecutor must be afforded reasonable latitude in arguing [her] position to the jury and [she] may employ oratorical flair in arguing in favor of the death penalty." *Commonwealth v. Stokes*, 576 Pa. 299, 839 A.2d 226, 231-32 (Pa. 2003) (internal citations omitted). Furthermore, "at the penalty phase, the prosecutor has more latitude in presenting argument since the presumption of innocence is no longer applicable." *Commonwealth v. Rompilla*, 554 Pa. 378, 721 A.2d 786, 790 (Pa. 1998).

Viewed in the context of the entire statement, the underlined comment of which appellant complains was nothing more than oratorical flair; the prosecutor summarized the evidence of appellant's criminal acts and argued, from that evidence, that the jury should impose a death sentence. Accordingly, this claim is meritless.

Appellant next argues he was entitled to have the jury instructed that "life" means "life without parole," because Draper's testimony left the jury with the impression a prisoner serving a life sentence would be eligible for

parole.[15] Draper testified that when he first agreed to plead guilty in exchange for a life sentence, he was under the impression he would later be eligible for parole if he testified against appellant. N.T. Trial, 1/23/86, at 784-86. Appellant contends "this incorrect information was never corrected by the prosecutor, defense counsel or the court...," Appellant's Brief, at 76; however, the record belies this claim. During the same line of questioning which revealed Draper's former misconception about his plea agreement, defense counsel queried, "But it is your understanding now that that's not part of your agreement?" and Draper responded, "Yes." N.T. Trial, 1/23/86, at 786-87. Defense counsel also stated during closing, while arguing for the imposition of a life sentence, that appellant would "never enjoy the fruits of being a father, because he will spend his entire life in jail." N.T. Trial, 2/3/86, at 1880. Furthermore, it was clear from Draper's testimony that he believed he might later be paroled because of his testimony against appellant; there was no similar cooperation with the Commonwealth by appellant. Therefore, appellant's claim is meritless.

Appellant next claims his death sentence was the product of improper racial discrimination, citing a 1998 study conducted by Professors David Baldus and

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15. Although such instruction is mandated in cases where the defendant's future dangerousness is at issue and defense counsel requests such instruction, *see Simmons v. South Carolina*, 512 U.S. 154, 129 L. Ed. 2d 133, 114 S. Ct. 2187 (1994); *Commonwealth v. Christy*, 540 Pa. 192, 656 A.2d 877 (Pa. 1995), *Simmons* was decided four years after appellant's judgment of sentence became final and thus is inapplicable to his case. Furthermore, appellant's future dangerousness was not at issue.

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George Woodworth which concluded the odds of an African-American defendant being sentenced to death in Philadelphia are more than four times greater than for other defendants. *See* David C. Baldus, *et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638 (1998). Appellant also relies on the "McMahon tape," a 1987 videotape in which a Philadelphia assistant district attorney, Jack McMahon, revealed a policy of racial discrimination in jury selection by members of that office. *See Commonwealth v. Wharton*, 571 Pa. 85, 811 A.2d 978 (Pa. 2002).

This Court has repeatedly rejected similar arguments on the basis that the mere existence of the tape does not demonstrate prejudice in a particular case. *Rollins*, at 443 n.10; *see also Commonwealth v. Marshall*, 570 Pa. 545, 810 A.2d 1211, 1228-29 (Pa. 2002); *Commonwealth v. Lark*, 560 Pa. 487, 746 A.2d 585, 588-89 (Pa. 2000). Similarly, we have rejected speculative arguments based on the study. *See Commonwealth v. Morris*, 573 Pa. 157, 822 A.2d 684, 698 (Pa. 2003) (citing *Marshall, supra*; *Lark, supra*). Although appellant discusses the Baldus study and the McMahon tape at length, he fails to demonstrate how these alleged discriminatory trends affected the jury selection in his case. He attempts to provide statistical evidence of the prosecutor's routine practice of striking African-Americans from jury panels, but, given the actual jury composition in this case was 41.6% African-American, he fails to show discrimination by the prosecutor. As appellant does not provide a link between the study/tape and the facts and circumstances of his particular case, his claim does not warrant relief.

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Appellant next challenges this Court's proportionality review of his sentence on direct appeal, essentially claiming the data compiled by the Administrative Office of Pennsylvania Courts is unreliable and flawed. A similar argument was addressed in *Commonwealth v. Gribble*, 550 Pa. 62, 703 A.2d 426, 440-41 (Pa. 1997) (finding nothing arbitrary or capricious in proportionality review scheme), and rejected; appellant presents no compelling reason for us to revisit this issue. Furthermore, appellant fails to demonstrate any specific error resulting from this Court's application of the data to his case. Accordingly, this claim is meritless.

Finally, appellant claims the cumulative effect of all the alleged errors entitles him to relief. However, as this Court has repeatedly stated, "no number of *failed* claims may collectively attain merit if they could not do so individually." *Commonwealth v. Williams*, 532 Pa. 265, 615 A.2d 716, 722 (Pa. 1992) (emphasis in original). Accordingly, we affirm the PCRA court's denial of relief; the Prothonotary of the Supreme Court is directed to transmit the complete record of this case to the Governor, pursuant to 42 Pa.C.S. § 9711(i).

Order affirmed. Jurisdiction relinquished.

Justice BAER files a concurring opinion.

Justice NIGRO files a dissenting opinion.

Justice SAYLOR files a dissenting opinion.

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Justice BAER concurring.

I write separately only to note my view that jury instructions, such as those given here, which mirror the language of Section 9711(c)(1)(iv) of the Pennsylvania Death Penalty Statute, 42 Pa.C.S. § 9711(c)(1)(iv), impermissibly infer a requirement that any mitigating circumstance must be found unanimously by the jury in violation of *Mills v. Maryland*, 486 U.S. 367, 100 L. Ed. 2d 384, 108 S. Ct. 1860 (1988).[1]

Nevertheless, I join the majority opinion in all respects for several reasons. First, the majority properly disposes of the assertion on a waiver theory, noting that such claim was previously litigated on direct appeal. Second, the majority notes the United States Supreme Court's recent ruling in *Beard v. Banks*, 542 U.S. 406, 159 L. Ed. 2d 494, 124 S. Ct. 2504 (U.S. 2004), makes it clear that *Mills* does not apply retroactively to cases, such as this, that were decided prior to its issuance.[2] Finally,

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1. Section 9711(c)(1)(iv) provides:

> [T]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases.

2. Appellant's trial occurred in 1986, two years prior to the Supreme Court's decision in *Mills*.

the majority notes that, on direct appeal, this Court, in upholding the instruction at issue, relied on our decision in *Commonwealth v. Frey*, 520 Pa. 338, 554 A.2d 27, 31 (Pa. 1989), *cert. denied*, 494 U.S. 1038, 108 L. Ed. 2d 635, 110 S. Ct. 1500 (1990), holding that the language of the death penalty statute does not "state or infer a requirement that any given mitigating circumstance must be unanimously recognized before it can be weighed against aggravating circumstances in reaching a verdict." Thus, based upon principles of *stare decisis*, I am bound to follow our prior precedent in this regard.

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Justice NIGRO dissenting.

I dissent, as I agree with Justice Saylor that Appellant has demonstrated that his trial counsel was ineffective for failing to adequately investigate and present evidence of mitigation, including evidence of Appellant's mental health and abusive childhood, at his penalty phase hearing. Appellant, however, has presented only a boilerplate allegation that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness in this regard. Thus, as the majority notes, Appellant has not preserved an ineffectiveness claim arising from appellate counsel's deficient performance and such a claim is the only one on which relief may be granted. *See* Slip Op. at 7. Given these circumstances, I would, consistent with this Court's recent decision in *Commonwealth v. McGill*, 574 Pa. 574, 832 A.2d 1014 (Pa. 2003), remand the matter to provide Appellant with the opportunity to develop his claim as it relates to appellate counsel's performance.

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Justice SAYLOR dissenting.

I respectfully differ with the majority's reasoning in several material respects. Furthermore, I would award a new penalty hearing relative to Appellant's claim of ineffective assistance of counsel for failing to adequately investigate and develop mitigation relevant to the capital sentencing determination.

First, I disagree with the majority's assignment to Appellant's claim of racial discrimination in jury selection of a deficiency, based on the requirements established in *Commonwealth v. Spence*, 534 Pa. 233, 627 A.2d 1176 (1993), which interposes as a prerequisite to assertion of a violation under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), the obligation to present a record identifying the race of the venirepersons stricken by the Commonwealth, the race of prospective jurors acceptable to the Commonwealth but stricken by the defense, and the racial composition of the jury finally selected. *See id.* at 246-47, 627 A.2d at 1182.[1] Although those seeking relief from criminal convictions have frequently had difficulty meeting these requirements, perhaps because preservation is frequently dependent on

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1. As the Court has recently observed, the United States Court of Appeals for the Third Circuit has deemed the *Spence* requirements to be an unreasonable application of federal law, at least as applied in some circumstances. *See Commonwealth v. Uderra*, ___ *Pa.* ___, ___, 580 Pa. 492, 862 A.2d 74, 2004 Pa. LEXIS 2499, 2004 WL 2363725, at *6-7 (Oct. 21, 2004) (citing *Holloway v. Horn*, 355 F.3d 707, 728-29 (3d Cir. 2004), *cert. denied*, 543 U.S. 976, 160 L. Ed. 2d 352, 125 S. Ct. 410 (2004)).

the thoroughness of trial counsel, in this particular case the trial court maintained its own, independent record concerning each of these factors, which it read into the record of the post-conviction proceedings.[2] Therefore, Appellant's assertion that the Commonwealth used 14 of 16 peremptory challenges to strike African Americans is not a bald one, as the majority indicates, *see* Majority Opinion, slip op. at 11, but is an undisputed matter of record in the case as developed and determined by the PCRA/trial judge. For the same reason, all of the other required information is squarely before the Court. *See supra* note 2.

At least in the context of an contemporaneous challenge to an in-progress jury selection proceeding, it is my position that a prosecutor's direction of 14 of 16 peremptory challenges (or almost 90 percent of the total strikes employed) toward African Amercian venirepersons, out of a jury pool comprised of less than 40 percent persons having such racial heritage, should be deemed sufficient to make out a *prima facie* case under *Batson*, thus implicating an explanation of the race-neutral bases for the challenges (if any) from the prosecutor.

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2. The record thus reflects that the total composition of the jury panel was 111 jurors, 68 of whom were Caucasian and 43 of whom were African American. The composition of the jury was seven Caucasian members, five African Americans. Total peremptory challenges asserted were 35, 16 of which were utilized by the Commonwealth to challenge two Caucasian and 14 African American venirepersons, and 19 of which were utilized by the defense to challenge 16 Caucasian venirepersons and three African Americans. *See* N.T., April 16, 1998, at 643.

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See generally Batson, 476 U.S. at 96, 106 S. Ct. at 1723 (explaining that a criminal defendant is entitled to rely upon the fact that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"); *id.* at 97, 106 S. Ct. at 1723 (observing that "a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination"); *United States v. Alvarado*, 923 F.2d 253, 255-56 (2d Cir. 1991) (concluding that "a challenge rate nearly twice the likely minority percentage of the venire strongly supports a *prima facie* case under *Batson*"); *Commonwealth v. Jackson*, 386 Pa. Super. 29, 48 n.5, 49, 562 A.2d 338, 347 n.5, 348 (1989) (*en banc*). I concur in the majority's decision to affirm the denial of relief from the conviction in this case, however, as *Batson*'s burden-shifting scheme does not readily comport with the post-conviction review process when no contemporaneous objections were asserted at *voir dire*, *see Uderra*, 862 A.2d at 85-86, 2004 Pa. LEXIS 2499, 2004 WL 2363725; and, in any event, the prosecutor provided race-neutral explanations in the PCRA proceedings to the degree that her memory permitted, as well as her categorical denial of engagement in the pernicious practice of discrimination. *See* N.T., April 16, 1998, at 648-732. Although it would have been preferable for the PCRA court to render more specific factual findings and conclusions of law on the *Batson* claim, particularly given the pattern emerging out of the strikes, it is apparent that the court acted in its capacity as fact finder to accept the prosecutor's testimony on the ultimate issue concerning her motivations.

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A second area of difference involves the review of Appellant's claim that the aggravating factor in Section 9711(d)(6) of the death penalty statute (killing committed during the perpetration of a felony) was improperly applied to him because he may have been convicted on the basis of the trial court's instruction as to accomplice liability rather than as the actual killer. *See* Majority Opinion, slip op. at 6-7. What is most troubling about this issue is that the Court's prior treatment of it on direct appeal, presently relied upon by the majority as a basis for denying further review, is glaringly superficial and incorrect. In this regard, the Court reasoned that Appellant could not have been convicted by the jury as an accomplice, because a first-degree murder conviction necessarily equates with a finding that the defendant struck the fatal blow. *See Commonwealth v. Williams*, 524 Pa. 218, 233-34, 570 A.2d 75, 83 (1990) (indicating that "this argument [*i.e.*, that Appellant might have been convicted as an accomplice], when raised in the context of the penalty stage, does not even reach the level of speciousness; it is simply ludicrous. The very same jury, less than twenty-four hours before, had just convicted appellant of first degree murder."). The Court so reasoned despite the fact that the trial court had issued a general accomplice liability instruction at the guilt phase of Appellant's trial,[3] and with no accounting

3. *See* N.T., February 3, 1986, at 1750 ("It will be your duty in this case to determine whether Amos Norwood died as a result of injuries inflicted upon him by this defendant or whether this defendant was an accomplice of the person who actually inflicted the injuries, and if so, whether such killing amounted to murder of the first degree[.]"), *id.* at 1768-70 (general accomplice liability instruction). The accomplice liability charge presumably was

for the established law that a defendant can be convicted of first-degree murder based on an accomplice liability theory without the necessity of his direct participation in the actual killing. *See, e.g., Commonwealth v. Smith*, 480 Pa. 524, 528-29, 391 A.2d 1009, 1011 (1978).

Moreover, as the majority notes, the Court has separately determined that the in-perpetration-of-a-felony aggravator does not apply to one who is convicted of first-degree murder merely as an accomplice. *See Commonwealth v. Lassiter*, 554 Pa. 586, 595, 722 A.2d 657, 662 (1998) ("[Section] 9711(d)(6) may not be applied to an accomplice who did not 'commit' the killing in the sense of bringing it to completion or finishing it.").[4]

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issued at the Commonwealth's instance precisely to account for the possibility that one or more jurors might give some credence to the defense evidence to the effect that Appellant left the company of the victim at a time when he was unharmed but under restraint by Michael Hopkins and Marc Draper. *See, e.g.*, N.T., January 27, 1986, at 1182-84.

4. Although *Lassiter* is a plurality opinion, six Justices agreed that a prosecution for murder based on accomplice liability will not support the use of the aggravating circumstance set forth in Section 9711(d)(6). *See Lassiter*, 554 Pa. at 595, 722 A.2d at 661; *id.* at 599-600, 722 A.2d at 664 (Saylor, J., dissenting) ("I agree with the majority that a prosecution for murder based on accomplice liability will not support the use of the aggravating circumstance set forth in Section 9711(d)(6) of the Judicial Code."). Additionally, I do not believe that there is any retroactivity concern regarding *Lassiter*, since it merely represents a plain-text reading of a substantive provision of statutory law that was in place at the time of Appellant's trial. *See Lassiter*, 554 Pa. at 593, 722 A.2d at 660-61 (stating that "we believe that this matter can and must be resolved by reference to the text and plain meaning of the statute itself").

Appellant, however, was deprived of the benefit of a determination in this regard in his direct appeal by this Court's failure to cognize rudimentary aspects of the law of accomplice liability and its potential role in the jurors' determination of Appellant's guilt of first-degree murder. In the face of appellate court error that is so apparent, I have substantial difficulty with application of the bar of previous litigation, as I believe that such application is in tension with the courts' constitutional obligation to assure that the writ of habeas corpus remains unsuspended. *See* Pa. Const. art. I, § 14.[5]

Regarding the ineffectiveness claim relative to counsel's failure to investigate and adduce adequate mitigation in the penalty phase, the governing standards are well established. In general, capital defense counsel are obliged to conduct reasonable investigations or reach reasonable decisions that make a particular investigation unnecessary. *See Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 2066, 80 L. Ed. 2d 674 (1984); *Commonwealth v. Basemore*, 560 Pa. 258, 289, 744 A.2d 717, 735 (2000). In the context of the penalty phase of a capital case, counsel has a duty to thoroughly investigate a defendant's background, *see Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 1515, 146 L. Ed. 2d 389 (2000), including the obligation to "discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the

5. This issue is also more significant to my analysis than it is to the majority's, given my position, developed below, concerning counsel's stewardship in connection with the jury's finding of no mitigation.

prosecutor.'" *Wiggins v. Smith*, 539 U.S. 510, 156 L. Ed. 2d 471, 123 S. Ct. 2527, 2537 (2003) (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES, 11.4.1(C), p. 93 (1989)).[6] The reasonableness of a particular investigation depends upon evidence known to counsel, as well as evidence that would cause a reasonable attorney to conduct a further investigation, *see id.* at 526-27, 123 S. Ct. at 2538; however, strategic decisions made on the basis of an inadequate investigation can be deemed reasonable only to the extent that reasonable professional judgment supported the limitations on the investigation. *See id.* at 529, 123 S. Ct. at 2539. Finally, in terms of the reasonable basis and prejudice prongs of the ineffectiveness inquiry, relief is available only in cases in which it can be concluded that an alternative not chosen offered a potential for success substantially greater than the course actually pursued. *See Commonwealth v. Williams*, 557 Pa. 207, 248, 732 A.2d 1167, 1189 (1999).

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6. I make substantial reference herein to the ABA Guidelines, realizing that this Court has not endorsed or adopted them on a wholesale basis. The United States Supreme Court, however, has referenced these Guidelines in terms of articulating prevailing norms for effective counsel. *See, e.g., Wiggins*, 539 U.S. at 522-523, 123 S. Ct. at 2536-37. In any event, in my view, the drafters' claim that the Guidelines "embody the current consensus about what is required to provide effective defense representation in capital cases," ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 1.1, commentary (rev. ed. Feb. 2004) [hereinafter, ABA GUIDELINES], is not an exaggerated one.

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Here, the record shows fairly plainly that counsel was remiss in his penalty-phase investigation and preparation. Although it was his first capital penalty proceeding, *see* N.T., April 24, 1987, at 15, counsel apparently failed to meet personally with Appellant until one week prior to trial. *See* N.T., January 6, 1986, at 25, 31-33; N.T., April 16, 1998, at 755.[7] Furthermore, it is undeniable that competent counsel would have reviewed records from Appellant's

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7. Counsel's primary excuse in this regard centered on his practice of using associates. *See, e.g.*, N.T., January 6, 1986, at 22. There is little in the record, however, to suggest that there was actual, meaningful pre-trial preparation undertaken by Appellant's associates. Moreover, I have difficulty with the proposition that lead capital counsel can expect to develop the kind of trust relationship with his client that is essential to effective representation without meeting his client substantially in advance of trial. The ABA Guidelines' commentary explains:

> Establishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea. Client contact must be ongoing, and include sufficient time spent at the prison to develop a rapport between attorney and client. An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial . . .. Even if counsel manages to ask the right questions, a client will not — with good reason — trust a lawyer who visits only a few times before trial . . ..

ABA GUIDELINES, 11.4.1(C), commentary.

other criminal proceedings (particularly since they were in issue in the case in terms of the Commonwealth's assertion of the significant-history-of-violent-felony-convictions aggravator). *See* generally ABA GUIDELINES 1.1, commentary ("stating that "if the defendant has any prior criminal history, . . . defense counsel accordingly must comprehensively investigate"); *id.* 10.7, commentary (same). Thus, counsel would have become aware of the prior, pre-sentence investigation in Appellant's criminal record indicating that he had a recent psychotic episode and was a candidate for psychiatric evaluation and treatment. *See* N.T., April 16, 1998, at 763, Ex. C-2; *see* also N.T., April 8, 1998, at 81. This, in turn, would trigger an obligation on counsel's part to undertake a further investigation into his client's mental health. According to expert testimony adduced by Appellant at the PCRA hearing that was not specifically rejected by the PCRA court (and common sense), a capital defendant's history of having had a psychotic episode absolutely requires further investigation.[8] Instead, what occurred is that counsel

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8. *See* N.T., April 8, 1998, at 87-88 (testimony from a psychiatrist that a psychotic episode "absolutely" would have required further investigation); N.T., April 9, 1998, at 373 (psychologist describing the event as a "red flag" and "alerting signal"); N.T., April 13, 1998, at 549 (psychiatrist indicating that the report showed that "something [was] grossly wrong"); *cf. Commonwealth v. Fears*, 575 Pa. 281, 836 A.2d 52, 72-73 (2003) (finding that an ineffectiveness claim had arguable merit where trial counsel failed to investigate potential psychiatric evidence). *See* generally ABA GUIDELINES 4.1, commentary (observing that "mental health issues are so ubiquitous in capital representation that the provision of resources in that area should be routine"); *id.* 4.1, commentary ("In particular, mental health experts are

apparently, and inappropriately, relied upon his own assessment of Appellant to discount involving a mental health professional, N.T., Jul. 1, 1987, at 60-61.[9] Notably, as well, since counsel first observed Appellant immediately before trial, the opportunity to develop mental health evidence upon his observations was severely constrained.[10]

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essential to defending capital cases. Neurological and psychiatric impairment, combined with a history of physical and sexual abuse, are common among persons convicted of violent offenses on death row."); *id.* (observing that "the defendant's psychological and social history and his emotional and mental health are often of vital importance to the jury's decision at the punishment phase[;] . . . counsel must compile extensive historical data, as well as obtain a thorough physical and neurological examination.").

9. *Cf. Austin v. Bell*, 126 F.3d 843, 849 (6th Cir. 1997) (finding deficient stewardship arising from capital trial counsel's failure to investigate and present mitigating evidence at the penalty phase "because he did not think that it would do any good"); *accord* ABA GUIDELINES, 4.1 ("Counsel's own observations of the client's mental status, while necessary, can hardly be expected to be sufficient to detect the array of conditions (*e.g.*, post-traumatic stress disorder, fetal alcohol syndrome, pesticide poisoning, lead poisoning, schizophrenia, mental retardation) that could be of critical importance." (footnote omitted)).

10. Trial counsel also did not seem to be versed in the use of psychiatric evidence as mitigation, as reflected in the following interchange from the PCRA hearing:

> Q: Do you know what it means to have a paranoid delusional system?
> A: Uhm, today I can't give you a working definition, no.
> Q: Do you know what psychosis is?
> A: Today vis-à-vis this case, no.
> Q: I'm sorry.

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Evidence adduced at Appellant's post-conviction hearing indicated that, had counsel undertaken such an investigation by exploring Appellant's life history and having Appellant examined by a defense expert from the mental health field, he would have uncovered a history of emotional and physical trauma, and chronic and major psychiatric illness in place as of the time of Appellant's offenses. The evidence developed at hearing, if believed (and the PCRA court did not render any findings rejecting it on credibility grounds), revealed that Appellant was reared in a severely dysfunctional family, with members' relationships characterized by

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A: No.

* * *

Q: Do you know the interaction between impulsivity and post-traumatic stress disorder?
[PROSECUTOR]: Objection.
Q: (continued) If any.
THE COURT: I'm going to sustain it. That's enough. That's enough.
[THE COURT]: Your basic position is, reading the report, without knowing what all the things are, it was your strategy then not to proceed with psychiatric testimony; is that correct?
A: That's absolutely correct.
Q: Would your strategy be any different today?
A: No, not at all.
[PCRA counsel]: But you don't know what any of this means?
[THE COURT]: You can argue that.

N.T., April 13, 1998, at 801-02.

neglect, abandonment,[11] and routine violence that was often vicious,[12] and sometimes public. *See* N.T., April 9, 1998, at 497-98. The evidence also depicted Appellant's enlistment by his mother into the pattern of abuse. *See* N.T., April 9, 1998, at 302-03 (testimony of Appellant's sister describing incidents in which Appellant and his brother were told by the mother to tie the sister to the bed, in preparation for a beating). Furthermore, there was evidence that Appellant was subject to multiple sexual

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11. *See, e.g.*, N.T., April 8, 1998, at 269-70 (testimony of Appellant's brother observing that, in interactions between Appellant and a stepfather, the stepfather "acted like [Appellant] wasn't there").

12. *See, e.g.*, N.T., April 8, 1998, at 195 (testimony of Appellant's mother that she beat his head against a wall, "picked him up and threw him down the flight of steps and I beat him like Muhammad Ali"); *id.* at 196 ("I would beat [Appellant] very often . . .."); *id.* at 197-200 (description of interspousal violence, including blackjacking witnessed by Appellant); *id.* at 216 (testimony of a school teacher concerning uncontrolled rages on the part of Appellant's mother and "huge explosions" between her and Appellant's stepfather); *id.* at 256 (testimony of Appellant's older brother that the mother beat the children with "a belt, a board, a stick, a brick, a switch, whatever she got in her hand . . .."); *id.* at 255-56 (testimony of the brother concerning his having assumed the role of abuser with respect to the younger children in the household); N.T., April 9, 1998, at 298 (testimony of Appellant's sister to beatings "with brooms, sticks, belts, pots and pans, knives, shoes, chairs"); *id.* at 298 (describing the intentional scalding of Appellant's sister by his mother); *id.* at 492-95 (testimony of a friend concerning the "raging" behavior of Appellant's stepfather, describing the violence as a "family ritual"); N.T., April 13, 1998, at 620-32 (testimony of a neighborhood resident and family friend concerning the family history of violence).

victimizations (including sodomy) during his childhood, in the local neighborhood and a youth placement facility, and at the hands of a teacher.[13] Additionally, it was developed that Appellant, as a child, engaged in acts of self-abuse and mutilation, characteristic of people in distress. *See, e.g.*, N.T., April 8-9, 1998, at 204, 332.

Post-conviction testimony was also adduced from expert witnesses from the mental health field to develop the effects of the sort of trauma described in the evidence on a child's mental and emotional development, in terms of its impact in generating humiliation, shame, depression, and feelings of helplessness, as well as impeding the development of a sense of self-worth, *see, e.g.*, N.T., April 8-9, 1998, at 48, 325, 327, 333-34; N.T., April 13, 1998, at 534; the fostering of repressed and overt anger, *see, e.g., id.* at 66, 97, 349, facilitation of aggressiveness as a behavior, *see, e.g., id.* at 49; and yielding the sorts of repressive, disassociative, and impulsive responses and behaviors that are prevalent among abused children. *See, e.g.*, N.T., April 9, 1998, at 388; N.T., April 13, 1998, at 532. *See* generally N.T., April 13, 1998, at 543 (testimony of Ralph Kauffman, M.D., describing the "whole fabric of abusive relationships that have these kind of power dynamics of abuser/abused"). The expert evidence also indicated the role of the abuse in Appellant's diagnosis as suffering from major mental health disorders as of the commission of the killing underlying his death sentence. *See, e.g.*, N.T., April 8, 1998, at 42-43, 106 (testimony of Dr. Kessel, *inter alia*, chronic post-traumatic stress disorder and major

13. *See, e.g.*, N.T., April 8, 1998, at 193 (testimony of Appellant's mother describing his sodomization).

depression, Axis I diagnoses); N.T., April 9, 1998, at 373 (testimony of Dr. Patricia Fleming, a clinical psychologist experienced in working with abused children); N.T., April 13, 1998, at 520-21, 551 (Dr. Kauffman).[14]

It is my position that the mitigation evidence presented on post-conviction review represented a substantially better case in favor of imposition of a life sentence and against death than reliance solely on the athletic-achievement-and-community-participation approach that the majority attributes to trial counsel. This is particularly so, in my view, given trial counsel's sub-standard, single-paragraph argument to the jury on this latter score.[15] Moreover, to the extent that the jurors

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14. Notably, the Commonwealth presented no contrary testimony from an expert witness examining Appellant for purposes of rebutting the case of psychiatric mitigation. *Compare Commonwealth v. Lopez*, 578 Pa. 545, 557-58, 854 A.2d 465, 472 (2004) (Saylor, J., concurring) (concurring in the denial of post-conviction relief in a case in which the Commonwealth presented testimony of an expert psychiatrist, credited by the PCRA court, to the effect that the appellant suffered from no mental health deficits).

15. Oddly, this was put to the jury, not for the reasons that the majority suggests (to show some other side to Appellant), but rather, as follows:

> [Appellant's] athletic ability, his physical ability will now work to his detriment. If you ever heard of a book, The Belly of the Beast, it vividly describes prison life. There is no impediment, because of his physical stature, to living all of the evils, all of the detriments, all of the brutalities that are associated with prison life. He will have them to the fullest.

on their own might have been inclined to view the athletic-achievement-and-community-participation evidence as mitigating, the Commonwealth's response could readily have been anticipated,[16] and blunted by the presentation of the fuller perspective concerning Appellant's life that trial counsel never uncovered.

I also believe that the PCRA court's approach in rejecting the ineffectiveness claims arising out of counsel's

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N.T., February 3, 1986, at 1880-81. The entire penalty-phase closing argument for the defense consists of only four pages of transcript. *See id.* at 1877-81; *cf. Douglas v. Woodford*, 316 F.3d 1079, 1087-89 (9th Cir. 2003) (finding counsel ineffective, *inter alia*, for failing to adequately present the material that he did have "to the jury in a sufficiently detailed and sympathetic manner").

16. The district attorney argued:

> Now, I dare say, ladies and gentlemen . . . that everyone was shocked and dismayed that their hero, their quarterback, their athletic star, was guilty of such a horrible crime . . . the defendant presents an image of a person who had all kinds of advantages. Such a person would be able to essentially make the best possible life for himself and for the people that have loved him and cared for him . . .. He had a girlfriend and a child and friends and supportive teachers and people who I suggest to you looked up to him because he was gifted. He had the gift of an athletic ability that would have permitted him to do whatever he wanted with his life. He had the opportunity to not only finish high school but to go on to college. He could have made whatever he wanted out of his life but what did he do instead?

N.T., Feb. 3, 1986, at 1874-76.

failure to investigate and present the life-history and mental-health mitigation evidence is a flawed one. The court offered two reasons for rejecting the life-history mitigation: first, that some evidence of the abuse of Appellant at the hands of his stepfather was actually put before the jury at the penalty phase of his trial, and second, that Appellant failed to cooperate in obtaining witnesses. Although the court is correct that testimony was in fact adduced at trial briefly describing abuse by the stepfather, the evidence was not developed by trial counsel for defense purposes. Rather, it was adduced by Commonwealth for its own purposes during its cross-examination of Appellant's mother, *see* N.T., Feb. 3, 1986, at 1856-57; moreover, trial counsel did not argue that it should be considered to be mitigating in his exceptionally brief penalty-phase summation. *See* N.T., Feb. 3, 1986, at 1877-81. Additionally, trial counsel had not offered (and was obviously unprepared to offer) expert testimony from a mental health professional to establish a concrete framework concerning why the evidence that was heard should be considered mitigating.

Regarding the PCRA court's indication that Appellant failed to cooperate with the production of witnesses, trial counsel's testimony was highly equivocal. Most times, counsel merely highlighted Appellant's expectation that counsel would defend the guilt-phase vigorously,[17]

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17. Contrary to counsel's frequent suggestions on the PCRA record, a capital defendant's insistence on defending against conviction is not an excuse to omit penalty-phase preparations. *Compare* N.T., April 17, 1998, at 760 (trial counsel's testimony that "[u]hm, I would just continue to urge you to what I — that

and denied having a specific recollection concerning discussions of mitigation.[18] Moreover, counsel substantially qualified his assertions of non-cooperation on Appellant's part, as follows:

> Q: Did Mr. Williams or his mother in any way prevent you from interviewing either those witnesses or other mitigation witnesses?
>
> A: Only to the extent that he had me focus on the guilt phase and that you have a certain amount of time. Remember what I said to you, I had negotiated to, where had he wanted it,

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[Appellant's] focus was that he was not guilty, uhm, and that was the general direction that we went in"); *id.* at 779 ("[Appellant] was very interested in being found not guilty. That was his — that was the focus . . .."); *id.* at 771 ("See, I'm a very busy person."); *id.* at 760 ("I'm going to say this one more time. I could have saved this man's life. We had negotiated a plea to where he could have gotten a life sentence."), with ABA GUIDELINES 10.7 ("Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty."). Notably, in the face of such expressions by counsel at trial, the trial court reminded counsel of Appellant's constitutional right to be tried by a jury, and the continuing obligations of counsel to adequately prepare and perform. *See* N.T., January 6, 1986, at 19, 25.

18. N.T., April 17, 1998, at 752 ("I don't have a specific recollection of having an independent thought process relative to guilt or penalty."); *id.* at 756 ("if you ask me a question relative to when we discussed mitigation and things, I don't really have a recollection"); *id.* at 766 ("No, you asked me if I have a recollection of [my thought process], I don't.").

> he could have had a consecutive life sentence. That's not what he wanted. He wanted to try the case. Okay?

N.T., April 17, 1998, at 768. Since the evidence indicates that Appellant did not affirmatively impede counsel's investigation in the relevant regard, I fail to see that counsel's inability or unwillingness to commit the time necessary to develop a defense as to all aspects of a capital case should be accepted as an excuse for his lack of preparation.[19] Similarly, Appellant's failure to identify

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19. Notably, the ABA Guidelines also add the following perspective concerning the sort of representation that was afforded here:

> Often, so-called "difficult clients" are the consequence of bad lawyering — either in the past or present.
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> * * *
>
> Some clients will initially insist that they want to be executed — as punishment or because they believe they would rather die than spend the rest of their lives in prison; some clients will want to contest their guilt but not present mitigation. It is ineffective assistance for counsel to simply acquiesce to such wishes, which usually reflect the distorting effects of overwhelming feelings of guilt and dispair rather than a rational decision in favor of a state-assisted suicide.

ABA GUIDELINES 10.5, commentary; *cf.* ABA GUIDELINES 10.7A(2) ("The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented."); *id.*, commentary ("Counsel cannot responsibly advise a client about the merits of different courses of action, the client cannot make informed

and raise the strategy on his own, *see, e.g.*, N.T., April 17, 1998, at 765 (trial counsel's testimony, indicating that Appellant's history of abuse was "not something he particularly raised with me"),[20] can hardly be accepted as a means of avoiding the finding of ineffectiveness. *See Commonwealth v. Malloy*, 579 Pa. 425, 856 A.2d 767, 788 (2004) ("The onus is not upon a criminal defendant to identify what types of evidence may be relevant and require development and pursuit. Counsel's duty is to discover such evidence through his own efforts, including pointed questioning of his client.").

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decisions, and counsel cannot be sure of the client's competency to make such decisions, unless counsel has first conducted a thorough investigation with respect to both phases of the case."); *accord Blanco v. Singletary*, 943 F.2d 1477, 1501-02 (11th Cir. 1991) (finding trial counsel ineffective where "the ultimate decision that was reached not to call witnesses [in mitigation] was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto defendant's statements that he did not want any witnesses called").

20. The following interchange between post-conviction and trial counsel is also representative:

> Q: Did you explore or investigate whether there was any question of in Mr. Williams' background in regards to childhood abuse or family dysfunction?
> A: He never, ever discussed anything like that with me.
> Q: Did you ask?
> A: Did I ask?
> Q: Did you ask?
> A: I honestly don't recall, but I'm sure I would have had discussion, is there anything you want me to bring out?

N.T., April 13, 1998, at 761-62.

Appendix S

The PCRA court's opinion also does not diffuse the import of the mental health mitigation evidence. In this regard, the court's analysis primarily entailed identification of a few discrete weaknesses in facets of Appellant's expert testimony, but it failed to squarely confront the overall purport of the testimony. For example, while criticizing one expert for failing to render an ultimate conclusion concerning Appellant's ability to conform his conduct to the requirements of the law at the time of his offense, the PCRA court merely disregarded the extensive testimony of Appellant's primary expert witness, a forensic psychiatrist, to the effect that Appellant suffered from extreme mental or emotional disturbance at the time of his offense. *See, e.g.,* N.T., April 8, 1998, at 106. *See generally* 42 Pa.C.S. § 9711(e)(2) (indicating that mitigating circumstances shall include that "the defendant was under the influence of extreme mental or emotional disturbance"). Indeed, the PCRA court made no mention in its opinion of the testimony of the forensic psychiatrist, Dr. Julie Beth Kessel, or her conclusion implicating the mitigating circumstance at Section 9711(e)(2), which was never presented to Appellant's capital sentencing jury.

The PCRA court's position concerning mental health mitigation is punctuated by its categorical statement that evidence that tends to show impulsiveness and anti-social behavior will not be regarded by jurors as mitigating. *See, e.g.,* PCRA Court Opinion, slip op. at 14 (stating that the fact "that Petitioner's judgment [may have been] impaired and that his response to social judgment questions indicated that he would respond impulsively in stressful situations in a manner without regard for the

consequences of his actions and their impact on others . . . cannot be characterized as beneficial to petitioner"). This sort of reasoning, in my view, does not constitute fact finding tied to the individual circumstances of the case, but rather, represents a philosophical position that is contrary to decisions of the United States Supreme Court that have recognized the potency of life-history and mental-health mitigation in terms of capital sentencing, *see, e.g.*, *Wiggins*, 539 U.S. at 510, 123 S. Ct. at 2527; *Williams*, 529 U.S. at 396, 120 S. Ct. at 1495,[21] the ABA Guidelines, and the experience of the Defender Association of Philadelphia and other legal service providers in the capital arena which recognize the Guidelines' approach.

The PCRA court's position concerning the connotation of impulsivity or anti-social behavior arising out of the evidence is also highly superficial, in that it fails to take into account the reality that, in any capital trial in which guilt has been established, the jurors already are well aware that the defendant has engaged in impulsive, aberrant, and/or anti-social behavior. Indeed, the

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21. The majority distinguishes the United States Supreme Court's decision in *Williams* on the basis that the familial abuse present in *Williams* was substantially greater based on the fact that the parents had been incarcerated for it. *See* Majority Opinion, slip op. at 22 n.12. It cannot reasonably be disputed, however, that the type of conduct described in the evidence here was equally deserving of punishment (and/or treatment if the requisite culpability on the part of the perpetrators was not present), had intervention occurred. Moreover, it does not seem to me that the presence or absence of governmental detection and/or intervention should be deemed controlling.

defendant has at least once perpetrated the ultimate act of this kind, *i.e.*, the unjustified killing of a human being with specific intent and malice. In this case, moreover, the Commonwealth had legitimately put before the jury not only Appellant's conviction for the present murder, but also a fairly extensive series of other serious violent felonies. Accordingly, there seems to me to have been little danger in an attempt to establish some broader context for Appellant's behavior in terms of mitigation, which was precisely trial counsel's role. In this regard, the role of life-history and mental-health mitigation evidence, where it is available, is not to try to excuse that behavior (which in any event will be subject to severe punishment),[22] but rather (and only) to attempt to convey that there is some factor or factor that militates against the exercise of governmental power to extinguish the defendant's life.[23]

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22. *Accord* ABA GUIDELINES 10.11, commentary ("None of this evidence should be offered as a counterweight to the gravity of the crime, but rather to show that the person who committed the crime is a flawed but real individual rather than a generic evildoer[.]").

23. *Accord Simmons v. Luebbers*, 299 F.3d 929, 938-39 (8th Cir. 2002) ("By the time the state was finished with its case, the jury's perception of Simmons could not have been more unpleasant. Mitigating evidence was essential to provide some sort of explanation for Simmons's abhorrent behavior. Despite the availability of such evidence, however, none was presented. Simmons's attorneys' representation was ineffective."), *cert. denied*, 538 U.S. 923, 123 S. Ct. 1582, 155 L. Ed. 2d 314 (2003); *Ainsworth v. Woodford*, 268 F.3d 868, 876 (9th Cir. 2001) (indicating that the introduction of expert testimony in mitigation would also have been important to explain the effects that serious physical and psychological abuse and neglect as a child had on the defendant); ABA GUIDELINES

Particularly as the General Assembly has recognized the presence of major mental or emotional infirmity as a specific category of mitigation, *see* 42 Pa.C.S. § 9711(e)(2), courts of law should be hard pressed to effectively rule them out categorically in instances in which they have been overlooked by counsel.[24]

The majority's reasoning overlaps with that of the PCRA court, and, for that reason, fails to persuade me. In addition, the majority absolves counsel of his failure to conduct further investigation into a documented psychotic episode and associated recommendation of psychiatric treatment, based on the absence of an indication of a previous psychiatric history. *See* Majority Opinion, slip op. at 20. In my view, however, neither the absence of any self-recognition or reporting on the part of a criminal

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10.11, commentary (noting that expert testimony may explain the effects of mental impairments on the defendant's judgment and impulse control).

24. The PCRA court and the Commonwealth certainly are not incorrect in their assertion that some jurors may not view a pattern of violent and impulsive behavior arising from disassociation, repressed anger, and mental health infirmity as mitigating, no matter what the source or degree of the impairment. But it is equally undeniable, as experience has shown in capital cases, that some jurors will in some situations view this as mitigating, and, in our system of justice, it takes a single juror of twelve to avoid the imposition of a capital sentence. *See Wiggins*, 539 U.S. at 537, 123 S. Ct. at 2543 (explaining that the context in which courts are to review the prejudice prong of the ineffectiveness inquiry is in terms of whether "there is a reasonable probability that at least one juror would have struck a different balance").

defendant concerning a mental health diagnosis and/or a prior record of intervention and treatment controls the obligations of counsel who has or should have become aware of psychiatric involvement, particularly since those suffering from mental illness frequently remain untreated and unaware of psychiatrically recognizable illnesses. *See supra* note 8; *accord Averhart v. State*, 614 N.E.2d 924, 930 (Ind. 1993) (finding capital defense counsel ineffective, *inter alia*, for naively placing undue emphasis on the contents of a pre-sentence report in terms of the production of his own case for mitigation).

In summary, I believe that the record paints a fairly stark picture of penalty-phase ineffectiveness of counsel, as it reflects an inadequate investigation and the making of strategic decisions and recommendations on an uninformed basis. Moreover, as I am unable to conclude that at least one juror might not have credited the mitigation that should have been presented in favor of life imprisonment and found its weight at least equal to the Commonwealth's case for death, I would award a new penalty hearing, or, at a minimum, remand for proceedings consistent with *Commonwealth v. McGill*, 574 Pa. 574, 832 A.2d 1014 (2003), were that to be deemed necessary by the Court.

Finally, on the issue of the availability of an instruction under *Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994), I agree with the majority that *Simmons* is not retroactive in its application. *See* Majority Opinion, slip op. at 24 n.15. I differ with the majority's indication that Appellant's future dangerous

was not before the jury in this case, however,[25] as it does not appear to be in keeping with recent decisions of the United States Supreme Court. *See Kelly v. South Carolina*, 534 U.S. 246, 253-54, 122 S. Ct. 726, 731-32, 151 L. Ed. 2d 670 (2002).

25. *See, e.g.*, N.T., Feb. 3, 1986, at 1876-77 (penalty-phase summation of the district attorney arguing that Appellant "terrorized, he robbed, he [p]lundered, and he killed, and he continued to kill . . .. I am asking you, ladies and gentlemen, to impose the death penalty because our system of justice must stop him. He must be stopped.").

APPENDIX T — OPINION OF THE SUPREME COURT OF PENNSYLVANIA, DATED FEBRUARY 8, 1990

SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

No. 98 E.D. Appeal Dkt. 1987

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

TERRANCE WILLIAMS,

Appellant.

October 23, 1989, Argued
February 8, 1990, Decided

Defendant was found guilty of first-degree murder, criminal conspiracy, and robbery, and appealed from judgment of sentence of the Court of Common Pleas of Philadelphia County, Trial Division, Criminal Section, Nos. 2363, 2365 and 2367 of August Term 1984, David Savitt, J., sentencing him to death. The Supreme Court, No. 98 E.D. Appeal Dkt. 1987, McDermott, J. held that: (1) prosecution could cross-examine defense witness about homicides for which he stood convicted but not yet sentenced; (2) no reversible error arose out of prosecution's asking defendant about whether he was suspect in

another death; (3) fact that defendant was only 18 years and four months of age at time of murder was not per se mitigating circumstance; and (4) trial counsel did not render ineffective assistance either during guilt phase or penalty phase of trial.

Affirmed.

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JUDGES: Nix, C.J., and Larsen, Flaherty, McDermott, Zappala and Papadakos, JJ.

OPINION

McDERMOTT, Justice

The appellant, after a trial by jury, was found guilty of first degree murder,[1] criminal conspiracy,[2] and robbery.[3] In the penalty stage of the trial, the same jury found two aggravating circumstances and no mitigating circumstances. Accordingly, appellant was sentenced to death on the first degree murder charge.[4] Subsequent to trial, appellant retained private counsel and his appointed trial counsel was permitted to withdraw. His new counsel filed lengthy and detailed post-trial motions, including a

1. 18 Pa.C.S. §§ 2501; 2502(a).

2. 18 Pa.C.S. § 903.

3. 18 Pa.C.S. § 3921.

4. 42 Pa.C.S. § 9711.

motion to vacate the death penalty. Also, appellant was permitted to file additional *pro se* motions containing multiple averments of trial error, prosecutorial misconduct and ineffectiveness of trial counsel. After a hearing, all post-trial motions were denied and formal sentence was imposed. In addition to the death penalty on the first degree murder charge, appellant was sentenced to a term of five (5) to ten (10) years on the conspiracy charge and ten (10) to twenty (20) years on the robbery charge, with the additional sentences to run consecutive to each other but concurrent to the death penalty sentence. The judgments of sentence were appealed directly to this Court.[5]

The facts underlying appellant's convictions are as follows.[6] In the late afternoon on Monday, June 11, 1984, appellant and Marc Draper, both eighteen years old at the time, were gambling with a few other unidentified persons on the corner of Mount Pleasant Avenue and Lincoln Drive in Philadelphia. The two, who had been close friends since third grade, both lost all their money while gambling. After conferring as to potential sources of additional funds, appellant advised Draper that he knew a man, Amos Norwood, who lived nearby from whom they could extort money. Unfortunately for Mr. Norwood, age 56, extortion was merely the opening scene in his personal tragedy.

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5. 42 Pa.C.S. § 722(4) and 42 Pa.C.S. § 9711(h).

6. The activities of appellant prior to and at the time of the murder are based primarily on the testimony of appellant's co-murderer, Marc Draper.

Appendix T

After discussing the proposed extortion, appellant and Draper then proceeded to the Norwood residence. While Draper waited at a nearby corner, appellant spent fifteen minutes in Norwood's house before rejoining Draper with ten dollars he had secured from Norwood. As he was exiting Norwood's residence, appellant crossed paths with Norwood's wife, Mamie. Although they did not know each other, appellant said hello to Mrs. Norwood as she passed by. Draper witnessed this exchange, although he did not know Mr. or Mrs. Norwood.

After securing the ten dollars from Norwood, appellant and Draper returned to the scene of the gambling but the participants had taken a break and were merely "rapping" i.e. talking. The pair remained, talking with the others. As misfortune would have it, Mr. Norwood, two or three hours later while on his way to his church to do some volunteer work, was driving by the intersection where the "rapping" was occurring. Appellant, upon seeing Norwood, flagged his car down, got in the car and drove away. A few minutes later, he returned with Norwood to the intersection, got out of the car and said to Draper "play it off like you going home, like you want to ride home, and we gonna take some money." Draper, grasping appellant's plan, got in the car with appellant and Norwood, and proceeded to give Norwood false directions home, leading Norwood instead to a dark secluded area adjacent to a cemetery.

At that point, Draper, who was in the rear driver's side seat, grabbed Norwood from behind and appellant, in the front passenger seat, ordered Norwood to "be quiet and get out of the car." Appellant, Draper and Norwood

exited the car, climbed over a small fence and proceeded into the cemetery. Upon arriving at some tombstones, Norwood was ordered to lie face down. Appellant and Draper searched Norwood and found twenty dollars hidden in his sock. While Norwood was begging for his life, the assailants tied his hands behind his back with his shirt, tied his legs together with his pants and stuffed his socks in his mouth.

Appellant then told Draper, "Wait, I'm going to the car . . . We're getting ready to do something." He then went to the car and returned with a socket wrench, which he gave to Draper, and a tire iron. After some discussion between appellant and Draper,[7] appellant commenced repeatedly hitting Norwood about the head with the tire iron. Appellant, while hitting the victim, said to Draper, "Man, you with me. We got to do this together." Whereupon, Draper joined in the brutality, striking Norwood's head repeatedly with the socket wrench, while appellant was smashing him with the tire iron.

Finally, when they perceived the victim was dead, the beating stopped and the body was hidden behind two tombstones and covered with some loose brush. The pair then returned to the victim's car, emptied the contents of the glove compartment into a trash bag and dumped the bag into a nearby trash bin. They then drove to Draper's

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7. According to Draper, this discussion included the following, "I'm already in a lot of trouble. I don't need no more trouble." Upon appropriate objection, this remark was stricken from the record.

house, where he got ready for work.[8] After making arrangements to meet the next morning, Draper went to work and appellant drove the victim's car to downtown Philadelphia to meet Ronald Rucker, a friend of some two months.

Rucker testified at trial that upon meeting appellant that night, appellant called him aside and confided to him that he had just "offed" a guy named Amos. Rucker testified that although he did not believe appellant at first, he came to believe him when he noticed blood spots on appellant's shoes and when he accompanied appellant for a drive shortly thereafter in the victim's car. After dropping Rucker off very late in the evening, appellant returned to the cemetery, soaked the victim's body in gasoline and set it on fire.

The next day, appellant picked up Draper in the victim's car and together they returned to the trash bin near the cemetery. Their purpose was to retrieve the contents of the glove compartment and determine if there was anything of value to them. In the victim's wallet, they found a Mastercard and an AT & T telephone card, both in the victim's name. Appellant advised Draper that he knew a person, Ronald Rucker, who could help them make use of the credit cards. The pair then picked up Rucker and, after Rucker confirmed that the Mastercard was usable,[9] the trio drove to Atlantic City, with the intention of using the Mastercard to secure cash advances. Prior

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8. Draper worked the midnight to 8:00 A.M. shift.

9. Rucker was employed by a restaurant and was familiar with the procedure utilized to detect stolen credit cards.

to the trip to Atlantic City, Rucker and Draper had never met each other.

Upon arriving in Atlantic City, the three attempted, without success, to secure cash advances with the Mastercard at various casinos. Later in the evening, appellant slipped away from his companions and, unbeknownst to them, secured two (2) one hundred dollar cash advances on the card. While at the casinos, Ronald Rucker used the AT & T telephone card to make various telephone calls. The next day, June 13, 1984, appellant used the Mastercard, by signing Norwood's name, to purchase two gold chains at a jewelry store in downtown Philadelphia.

The charred remains of Amos Norwood's body were found by a passerby on June 15, 1984. Despite the burning and extensive decomposition, it was possible to identify his body through his dental records. Because of incautious use of the AT & T telephone card, the ensuing investigation led police to Ronald Rucker and his sister, Renee. On July 18th and 19th, 1984, Ronald Rucker gave two statements to police implicating appellant and Marc Draper. Although Rucker told appellant he was interviewed by the police, he did not tell appellant how deeply he had implicated him during the police interviews.

In any event, on July 19, 1984, shortly after Rucker's second interview with the police, appellant and Rucker took a train to New York and from there they took a cross country bus, with California as their intended destination. Throughout the journey, the two made frequent phone calls home to determine the status of the ongoing investigation.

Appendix T

On July 20, 1984, Marc Draper, based on Ronald Rucker's statement to the police, was arrested and charged with homicide. Draper, the son of a Philadelphia policeman, made a full confession, describing his own role in the murder and appellant's role in the killing and aftermath.[10] On the same date, an arrest and search warrant was issued on appellant. As a result thereof, a search was conducted at appellant's residence. The search uncovered a blue jacket found in a box in appellant's bedroom. The jacket was later identified as belonging to Amos Norwood.

On July 21, 1984, after failing to locate appellant in Philadelphia, the police, through the National Crime Information Center, issued a "wanted message" regarding appellant to all police departments throughout the country. The next day, through a telephone conversation with his girlfriend, appellant discovered that there was an outstanding warrant for his arrest. On July 23, 1984, appellant returned to Philadelphia and surrendered himself to police at the office of an attorney.

Although Marc Draper was held in protective custody, appellant was able to speak with him and forward to him a series of four letters suggesting that Draper retract his prior statement and instead study and adopt the "story" contained in the letters, which "story" would exonerate appellant. Draper instead turned over the letters to the Commonwealth and they were introduced into evidence against appellant.

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10. The day after the murder, appellant confided to Draper that he had returned to the scene of the murder and set the victim's body ablaze.

Appendix T

On appeal to this Court, appellant raises five issues with respect to the guilt stage of his trial and nine issues with respect to the penalty stage. Preliminarily, however, it is required of this Court in cases in which the death penalty has been imposed to independently review the sufficiency of the evidence supporting an appellant's conviction. *See Commonwealth v. Zettlemoyer*, 500 Pa. 16, 26-27, n. 3, 454 A.2d 937, 942 n. 3 (1982), *cert. denied* 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983).

The test for determining the sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the verdict winner, the jury reasonably could have determined that all elements of the crime were established beyond a reasonable doubt. *See Commonwealth v. Syre*, 507 Pa. 299, 489 A.2d 1340 (1985), *cert. denied*, 480 U.S. 935, 107 S.Ct. 1577, 94 L.Ed.2d 768 (1987). In the instant case, the Commonwealth presented direct evidence from Marc Draper, appellant's longtime friend as to appellant's actions at the murder scene. This evidence was bolstered by Ronald Rucker's testimony that appellant had admitted to him his participation in the killing and the burning of the corpse. In addition, there was testimony from Mrs. Norwood placing appellant in the victim's company on the day of the murder and appellant's own testimony that he shared the proceeds of the robbery/murder, i.e. that he used the victim's Mastercard and car. Also, by way of physical evidence, there was testimony from Ronald Rucker about appellant's blood splattered shoes and testimony from the police regarding the recovery of the victim's jacket from appellant's bedroom. Finally, there were the four letters in appellant's own handwriting

concocting a "story" which would exonerate appellant and implicate Michael Hopkins, a conveniently dead mutual friend of Draper and appellant.

Countervailing the overwhelming evidence of the Commonwealth was appellant's unsubstantiated testimony that Marc Draper and Michael Hopkins actually committed the murder and that appellant used the victim's car and Mastercard only because he thought they were the by-products of a robbery and not a murder. Also, the credibility of each of the witnesses testifying on appellant's behalf was seriously undermined on their respective cross-examinations. Especially damaging was the credibility gap created by appellant's testimony with regard to the four letters to Draper delineating the "story" to be used in Draper's proposed retraction. Appellant, after hearing testimony from a handwriting expert, admitted writing the letters but claimed that he was merely the stenographer for a story actually concocted by Draper. However, since the primary beneficiary of the "story" was appellant and his role as stenographer was fraught with inconsistencies, including remarks supposedly attributable to Draper that are addressed to Draper himself, e.g., "Now listen Marc, we have to keep in touch," his testimony was not credible.

After reviewing the entire trial transcript, including the synopsis set forth above, it is clear that there was sufficient evidence presented for the jury to have determined that all elements of the crimes for which appellant was convicted were established beyond a reasonable doubt. See *Commonwealth v. Syre, id.*

Appendix T

Appellant's initial averment of error is that the trial court erred when it permitted the prosecution, on cross-examination of defense witness Porttie Robinson, to explore two homicides for which Robinson stood convicted but not yet sentenced. Robinson's testimony was to the effect that Draper, a prison mate of Robinson's, had told him that "another guy", other than appellant, had committed the murder with Draper. The prosecution brought out Robinson's homicides to establish that Robinson was biased against Draper because Draper's father, a police officer, had participated in the investigation leading to Robinson's homicide convictions. Testimony was adduced from the former prosecutor who handled the Robinson case that during discovery Draper's father's name was given to Robinson's attorney, as part of a list of officers involved in the investigation. Robinson denied knowing that Draper's father was involved in his case.

As a general rule, unsentenced convictions may not be used to impeach a witness. *See Commonwealth v. Zapata*, 455 Pa. 205, 314 A.2d 299 (1974). However, it is equally true that a party against whom a witness is called always has the right to show by cross-examination that a witness is biased or has an interest in the result of the trial. *See Commonwealth v. Cheatham*, 429 Pa. 198, 239 A.2d 293 (1968) and *Commonwealth v. Evans*, 511 Pa. 214, 512 A.2d 626 (1986). In the instant case, the introduction of Robinson's unsentenced convictions was relevant to show Robinson's potential bias against Draper because of the activities of his police officer father. Since Robinson denied any knowledge that Draper's father was involved in his investigation, it was within the province of the jury

to decide whether Robinson's testimony was tainted. See *Commonwealth v. Evans, id.*, 511 Pa. at 225, 512 A.2d 626.

Next, appellant contends that reversible error occurred when the prosecutor asked appellant, on cross-examination, whether he was a suspect in the death of one Donna Freedman, a case entirely unrelated to the Norwood murder. Appellant frames this issue by suggesting that "the prosecutor *informed* the jury that appellant was a suspect in the notorious slaying of Donna Freedman" (emphasis added). The reality, however, is that the death of Donna Freedman was first raised by appellant, in his direct testimony, by way of explaining why Draper could not tell the real story of the Norwood murder. In the scenario testified to by appellant on direct examination, since Michael Hopkins, appellant's deceased purported murderer of Norwood, and Draper murdered Donna Freedman, Draper could not implicate Hopkins in the Norwood murder for fear Hopkins would implicate him in the Freedman murder. On cross-examination, the prosecution was permitted, to a limited extent, to explore the Freedman murder to impeach appellant's scenario. When the prosecution asked appellant whether he was a suspect in the Freedman case, objection was promptly made and sustained and the question was stricken. Accordingly, in no way whatsoever was the jury "informed" that appellant was a suspect in the Freedman murder. Indeed, the Freedman murder would never have been mentioned in the trial if not for appellant's own testimony. Moreover, the trial court, on numerous occasions throughout the trial and in its instructions, advised the jury that the questions asked

by the respective attorneys were not testimony, only the answers adduced. Since there was no answer adduced with respect to whether appellant was a suspect in the Freedman murder and the issue itself was raised first by appellant, his averment of error is without merit.

Appellant's remaining three averments of error in the guilt stage of his trial involve claims of ineffectiveness of his trial counsel. As a general principle, trial counsel is presumed to be effective and a defendant has the burden of proving otherwise. *See Commonwealth v. McNeil*, 506 Pa. 607, 487 A.2d 802 (1985). Moreover, to prevail on a claim of ineffectiveness, a defendant must demonstrate that the course followed by trial counsel was unreasonable, that another meritorious course was available and that defendant was prejudiced by counsel's ineffectiveness. *See Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 235 A.2d 349 (1967) and *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973 (1987).

Firstly, appellant claims his counsel was ineffective for failing to seek a jury instruction as to the possible effect any deals between Marc Draper and the Commonwealth may have had on Draper's credibility. Appellant, however, again misstates the record. The record shows that counsel, as part of his requested charges, sought cautionary instructions as to the reliability of the testimony of (1) an "informer-interested witness", (2) an "immunized witness" and (3) an "accomplice." Indeed, the trial court's instructions included the following, "In view of the evidence of Marc Draper's criminal involvement, you must regard him as an accomplice . . . you should view the

testimony of an accomplice with disfavor because it comes from a corrupt and polluted source." Moreover, from his opening statement throughout his cross examination of Draper to the closing argument, defense counsel consistently emphasized the benefits arising to Draper from cutting a "deal" with the Commonwealth, i.e. he was permitted to plead guilty to second degree murder and receive a sentence of life imprisonment rather than face a first degree murder charge and the possibility of the death penalty. Accordingly, counsel was not ineffective with respect to the impact of Draper's deal on his credibility.

Appellant's two other allegations of ineffectiveness are related in that they both involve the definition of reasonable doubt. Appellant objects to the trial court's definition of reasonable doubt as a "doubt that would cause a reasonably careful and sensible person to hesitate before acting upon a matter of importance in his own affairs." He also objects to his trial counsel's use of the analogy of purchasing a home while discussing reasonable doubt in his closing argument. Appellant's argument is that both definitions or descriptions are "future oriented" dealing with "uncertainty and risk taking," rather than a retrospective evaluation of past events. Although appellant's argument has some facile appeal, it is thoroughly specious. He emphasizes the time component of the analogies while their real point is the relationship or connection between the level or type of doubt and the need to hesitate before acting or, in the case of a jury, making an important decision.

Furthermore, the charge of the trial court and defense counsel's analogy of the purchase of the home are, in appellant's own words, "standard" and "garden variety" examples given to juries throughout the Commonwealth. Therefore, a failure to object to such a charge or the use of such an example can hardly be considered prejudicially ineffective. *See Commonwealth v. Pierce, id* and *Commonwealth v. Lawson*, 519 Pa. 504, 549 A.2d 107 (1988).

Appellant's remaining averments of error concern the penalty stage of his trial, during which the jury found no mitigating circumstances and two aggravating circumstances, namely, that the murder occurred during the commission of a felony (the robbery) and a prior significant history of violent crimes.

Three of appellant's averments of error in the penalty stage relate to appellant's age at the time he murdered Amos Norwood. Appellant's basic contention is that being only eighteen years and four months of age at the time of the murder is a *per se* mitigating circumstance. Appellant provides no legal authority for this proposition and this Court is not aware of any. In this Commonwealth, for purposes of the Crimes Code, a person who has attained the age of eighteen is treated as an adult.[11] The jury in this case was made fully aware of appellant's age. Obviously, they did not consider it to be a mitigating circumstance. That was a decision wholly within their province and there is no legal or logical reason to overturn that decision.

---

11. 42 Pa.C.S. § 6302.

Appendix T

Two other averments of error relate to the recent United States Supreme Court case of *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), which held that a Maryland death penalty statute was unconstitutional because it required a jury to find mitigating circumstances pursuant only to a unanimous vote. However, our statute does not require unanimity in establishing mitigating circumstances. This topic was fully addressed in *Commonwealth v. Frey*, 520 Pa. 338, 554 A.2d 27 (1989) and appellant has not presented any argument not properly disposed of in that case. The trial court's instructions in the instant case were completely consistent with the statute and our decision in *Commonwealth v. Frey, id.*

Next, appellant urges that his judgment of sentence should be overturned because the prosecutor asked appellant on cross-examination whether he was a suspect in the murder of Donna Freedman. This issue was fully addressed previously in reference to the guilt stage of appellant. That discussion is equally applicable with respect to the penalty stage.

The three remaining averments of error are claims of ineffectiveness of trial counsel. The first claim is that trial counsel was ineffective for failing to object to the introduction by the Commonwealth of several misdemeanors in attempting to demonstrate appellant's prior significant history of violent felonies.[12] Factually, the prosecution introduced evidence, without objection,

12. 42 Pa.C.S. § 9711(d)(9).

as to the facts surrounding appellant's convictions with regard to two prior violent episodes, namely, convictions relating to his invasion of the home of an elderly couple and his terrorization of the couple with a rifle and convictions relating to his murder of a man six months before the instant murder, with a baseball bat and butcher knife. The butcher knife was left imbedded in the victim's throat after he had been stabbed twenty times.

The relevant statute is 42 Pa.C.S. 9711(a)(2) which provides, *inter alia*, as follows:

> In the sentencing hearing, evidence may be presented as to any matter that the court deems relevant and admissible on the question of the sentence to be imposed and shall include matters relating to any of the aggravating or mitigating circumstances specified in subsections (d) and (e).

Pursuant to 42 Pa.C.S. § 9711(d)(9), the prosecutrix in the instant case revealed to the jury the violent felonies for which appellant had been convicted previously and as part of that description listed the misdemeanor convictions arising out of the same events, e.g. in connection with appellant's third degree murder charge he was also convicted of theft and possessing an instrument of crime. The Commonwealth, in presenting its argument for the death penalty, is permitted to examine the facts surrounding the convictions of the violent felonies. *Commonwealth v. Beasley*, 505 Pa. 279, 479 A.2d 460 (1984). In the instant case, the revelation of the misdemeanor

convictions pales in comparison to the impact upon the jury of the more serious felony convictions. Thus, their revelation did not prejudice appellant's case and counsel was not ineffective for failing to object to them. *See Commonwealth v. Pierce, supra.*

Appellant also claims trial counsel was ineffective for failing to argue to the jury that the Commonwealth did not present evidence that appellant "committed a killing while in the perpetration of a felony,"[13] because there was no proof presented that appellant, rather than his co-brutalizer, Draper, landed the fatal blow. This argument, when raised in the context of the penalty stage, does not even reach the level of speciousness: it is simply ludicrous. The very same jury, less than twenty-four hours before, had just convicted appellant of first degree murder. Appellant now urges that his trial counsel was ineffective for not suggesting to the jury that appellant had not been convicted for "killing" the victim. Counsel is not required to present such patently meritless arguments even when the only straws within appellant's reach are exceedingly slippery ones. *See Commonwealth ex rel. Washington v. Maroney, supra.*

Appellant's final averment of error is that trial counsel was ineffective for failing to investigate and present appellant's "good prison record" as a potential mitigating circumstance. While it is true that *any* fact or circumstance about the defendant may be presented to a jury as a potential mitigating factor, it is not the duty

13. 42 Pa.C.S. § 9711(d)(6).

of a trial attorney to list for the defendant an exhaustive list of potential areas of mitigation; such a list would go on forever. The record in the instant case reveals that trial counsel, on a number of occasions, advised appellant that he should be prepared, in the event of his conviction, to supply counsel with factors about his life that could be seen as mitigating. Appellant failed to provide such information. Moreover, the alleged "good" record appellant now asserts is grounded in a letter dated April 13, 1987 from a corrections counselor at Huntingdon prison to appellant's appellate counsel. The letter, which addressed appellant's fourteen month stay at Huntingdon, can best be described as a lukewarm endorsement. While it notes that appellant exhibited a "cooperative attitude" in counselling sessions, it also reveals that his prior facility characterized his adjustment as "not being satisfactory at all times" and during his stay at Huntingdon, he received two conduct violations. Furthermore, if evidence of appellant's "good" prison record was introduced by trial counsel, the Commonwealth, in rebuttal, could have emphasized that during his stay at Huntingdon, appellant was passing notes to Marc Draper for the purpose of suborning perjury. All in all, it is hard to see how the presentation of appellant's prison record, as a whole, would have helped his case. Accordingly, trial counsel was not ineffective for failing to investigate and present appellant's prison record. *See Commonwealth v. Pierce, supra.*

Finally, we address the proportionality of appellant's sentence. Based on our review of the statistical data provided by our administrative offices and because of the jury's finding of two aggravating circumstances

and no mitigating circumstances, we conclude that the sentence of death was not disproportionate to the penalty imposed in similar cases. *See* 42 Pa.C.S. § 9711(h) and *Commonwealth v. Frey*, 504 Pa. 428, 475 A.2d 700 (1984) *cert. denied* 469 U.S. 963, 105 S.Ct. 360, 83 L.Ed.2d 296 (1984). The convictions and sentences imposed below are hereby affirmed.

APPENDIX U — MEMORANDUM AUTHORIZING DEATH PENALTY PROSECUTION, DATED JANUARY 21, 1986

CITY OF PHILADELPHIA

DATE 1/21/86

MEMORANDUM

TO: MARK GOTTLIEB, Chief, Homicide Unit

FROM: ANDREA G. FOULKES, Assistant District Attorney, Homicide Unit

SUBJECT: *COMMONWEALTH V. TERRANCE WILLIAMS*, CP #84-08-2362-2367

In the event the jury in the above-referenced case currently on trial, returns a verdict of Murder I, I request that we actively seek the death penalty.

In the instant case, the defendant, along with a co-defendant Marc Draper who is testifying for the Commonwealth in exchange for a plea to Murder II, Robbery & Conspiracy, abducted Amos Norwood, 56 years, chemist and resident of Mt. Airy, to the Ivy Hill Cemetery on the pretext of obtaining a ride home. There they forced him into the cemetery, tied him with his clothes, robbed him of money, credit cards, keys, etc. and Williams went back to the car to obtain a tire iron and a socket wrench. Upon his return to the bound and denuded victim he and Marc Draper proceeded to beat Amos Norwood about the head numerous times until he was dead. After taking Marc

Draper to work in Norwood's car, defendant returned with gasoline and burned the body, hidden between the gravestones to avoid its identification. Defendant obtained over $200 and purchased gold necklaces with Norwood's credit card. Thus, the first aggravating circumstance is that the case is a felony-murder which rises to Murder in the First Degree.

The defendant has been previously convicted of two serious felonies involving violence to another person:

1. In December, 1982, defendant and one Lucius Larke burglarized the residence of Don and Hilda Dorfman, both in their late 60's, in Mt. Airy, put a .22 caliber rifle to Mrs. Dorfman's head and demanded money as the terrified couple remained in bed. They ransacked the house, taking thousands of dollars worth of property. Defendant was convicted by Judge Michael Wallace and sentenced to 12 ½ to 25 years in prison.

2. In January, 1984, defendant was invited into the residence of Herbert Hamilton, age 50, in West Philadelphia. The victim was homosexual and Williams proceeded to get into bed with the victim concealing a knife. As Williams tried to stab Hamilton a fight ensued and Williams knocked out Hamilton with a baseball bat and then stabbed him numerous times in the back and left the knife lodged in his neck. Kerosene and numerous spent matches were found around the body but no fire was actually

started. Defendant took some property from the deceased's apartment after the killing. Defendant was found guilty by a jury of Murder III and PIC and Theft and sentenced by Judge Sabo to 13 ½ to 27 years consecutive to any other sentence.

The defendant is currently awaiting trial on the robbery Mr. Robert Hill, a friend of Herbert Hamilton. Marc Draper is his co-defendant in that case as well.

In mitigation, defendant is 19 years old and went through one year of college at Cheney University. At Germantown High School, he was reputed to be a promising quarterback and his team won the City championship. He has been described by persons who know him as a Jeckyl-Hyde personality.

Please advise.

[Handwritten Notes of Mark Gottlieb and Ronald D. Castille]

Ron,

I recommend seeking death.

M. Gottlieb 1/22/86

Mark,

Approved to proceed on the death penalty.

Ronald D. Castille

No. 15-5040

IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF FOR PETITIONER

LEIGH M. SKIPPER
Chief Federal Defender
STUART B. LEV*
SHAWN NOLAN
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Dated: November 30, 2015

262103

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QUESTIONS PRESENTED

1. In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009), this Court held that due process requires an "objective" inquiry into judicial bias. The question presented is:

   Are the Eighth and Fourteenth Amendments violated where the presiding Chief Justice of a state supreme court declines to recuse himself in a capital case where he had personally approved the decision to pursue capital punishment against Petitioner in his prior capacity as elected District Attorney and continued to head the District Attorney's office that defended the death verdict on appeal; where, in his state supreme court election campaign, the Chief Justice expressed strong support for capital punishment, with reference to the number of defendants he had "sent" to death row, including Petitioner; and where he then, as Chief Justice, reviewed a ruling by the state post-conviction court that his office committed prosecutorial misconduct under *Brady v. Maryland*, 373 U.S. 83 (1963), when it prosecuted and sought death against Petitioner?

2. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court left open the question whether the Constitution is violated by the bias, appearance of bias, or potential bias of one member of a multimember tribunal where that member did not cast the deciding vote. The circuits and states remain split on that question. The question presented is:

Are the Eighth and Fourteenth Amendments violated by the participation of a potentially biased jurist on a multimember tribunal deciding a capital case, regardless of whether his vote is ultimately decisive?

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OPINIONS BELOW

On the Commonwealth's appeal of a post-conviction order granting a new sentencing hearing, Petitioner filed a motion to recuse Chief Justice Ronald Castille of the Pennsylvania Supreme Court, with a request that he refer the recusal motion to the full court if he declined to recuse himself. On October 1, 2012, Chief Justice Castille denied both requests. JA 171a.

On December 15, 2014, the Pennsylvania Supreme Court issued an opinion reversing the Philadelphia Court of Common Pleas' grant of post-conviction sentencing relief and reinstating the sentence of death. *Commonwealth v. Williams*, 105 A.3d 1234, 1236 (Pa. 2014) (JA 16a).

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1257(a). The final judgment of the Pennsylvania Supreme Court was entered on December 15, 2014. The Pennsylvania Supreme Court entered an order denying Petitioner's application for reargument on February 18, 2015. This Court granted Petitioner an extension of time to file a petition for writ of certiorari until June 18, 2015. The petition was filed on June 12, 2015, and granted on October 1, 2015.

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend.

VIII. The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

INTRODUCTION

Due process requires disqualification of judges where the "'probability of actual bias . . . is too high to be constitutionally tolerable.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The circumstances in this case meet that standard.

Before his election to the Pennsylvania Supreme Court, Ronald Castille served as the elected District Attorney of Philadelphia. As the District Attorney, Mr. Castille was responsible for managing the Commonwealth's criminal prosecutions and, in potential capital cases, making the final determination whether the Commonwealth would seek a death sentence. District Attorney Castille reviewed the relevant facts and made the ultimate decision to seek the death penalty against Mr. Williams. Years later, when Mr. Williams was facing a scheduled execution, the post-conviction court found on the basis of newly uncovered evidence that the trial prosecutor, who had obtained District Attorney Castille's approval to seek the death penalty, had suppressed material mitigating evidence. Based on new evidence which supported Petitioner's claim that the fifty-six-year-old victim had sexually abused Petitioner and other underage teens, and that the prosecutor had presented false evidence and argument, the state post-conviction court vacated Petitioner's death sentence.

The Commonwealth appealed that decision to the Pennsylvania Supreme Court, which was now presided over by Chief Justice Castille. Petitioner's case had come full circle: the validity of Petitioner's death sentence and the propriety of the District Attorney's office's conduct were now being judged by the former head of that office, who was personally responsible for seeking the death penalty in the first place. In light of these facts, and the fact that the Chief Justice had also campaigned for election to the court by emphasizing that he had put 45 people on death row while he was District Attorney, Petitioner requested that Chief Justice Castille recuse himself. The Chief Justice summarily denied Petitioner's recusal motion and Petitioner's request that he refer the matter to the full court.

On these facts, Chief Justice Castille should have recused himself and should not have participated in the state court's review of the Commonwealth's appeal. His actions violated Mr. Williams' due process and Eighth Amendment rights.

STATEMENT OF THE CASE

A. Events Leading to Petitioner's Conviction and Death Sentence

Petitioner committed two homicides in Philadelphia, the first as a seventeen-year-old and the second shortly after turning eighteen. The same Assistant District Attorney prosecuted both cases. In the first case, that prosecutor "aggressively sought a first degree murder conviction and imposition of the death penalty." JA 146a. However, at that trial, the evidence established that the

victim had sexually abused Mr. Williams as a minor, and the jury returned a verdict of third-degree murder. JA 146a-47a.

In the second case, Mr. Williams and his co-defendant, Marc Draper, were charged with murdering and robbing fifty-six-year-old Amos Norwood in the Ivy Hill Cemetery on June 11, 1984. Mr. Williams was appointed new counsel who evinced little familiarity with the prior murder case. Meanwhile, from evidence she and the police had gathered, the prosecutor recognized the "obvious implication that [Mr. Williams'] relationship with Amos Norwood was substantially similar to his relationship with [the first victim]." JA 149a. Discovery provided pretrial to the defense, however, omitted all evidence of Mr. Norwood's sexual abuse of minors. JA 101a.

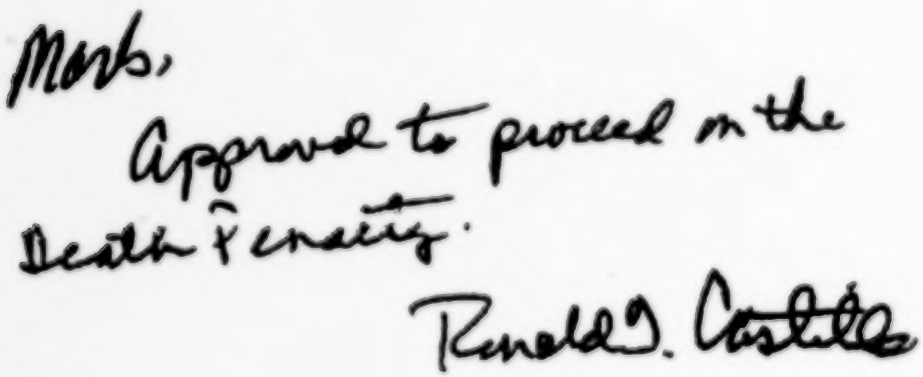
On January 21, 1986, the prosecutor requested the approval of her superiors to seek the death penalty against Mr. Williams. In a typed memorandum addressed to Mark Gottlieb, the Chief of the Homicide Unit, the trial prosecutor set forth facts supporting two statutory aggravating factors. The memorandum also discussed aggravating information beyond the statutory aggravating factors,[1] including that the defendants abducted the decedent "on the pretext of obtaining a ride home[,] . . . forced him into the cemetery, tied him with his clothes," and then Mr. Williams "went back to the car to obtain a tire iron

1. Under Pennsylvania law, evidence of non-statutory aggravating factors generally cannot be considered at capital sentencing. 42 Pa. Cons. Stat. § 9711(a)(2); *Commonwealth v. Hughes*, 865 A.2d 761, 798-99 (Pa. 2004) (evidence of prior bad acts that did not establish a statutory aggravating factor inadmissible at sentencing except as rebuttal).

and a socket wrench" with which the defendants beat the decedent to death; that Mr. Williams "returned with gasoline and burned the body"; and that Mr. Williams was awaiting trial on unrelated robbery charges. JA 424a-26a. The memorandum went on to discuss mitigating information, including Petitioner's youth, education, athletic achievements, and his description "by persons who know him as a Jeckyl-Hyde [sic] personality." JA 426a. The memorandum omitted mention of the victim's sexual misconduct. *See* JA 424a-26a.

The memorandum requested that the office "actively seek the death penalty," and concluded, "Please advise." JA 424a, 426a. At the bottom of the memorandum, Mr. Gottlieb placed a handwritten note: "Ron, I recommend seeking Death. M. Gottlieb 1/22/86." JA 426a.

District Attorney Castille had taken office earlier in the month, on January 6, 1986. After receiving the memorandum with Mr. Gottlieb's handwritten note, District Attorney Castille placed his own handwritten note at the end of the memorandum as follows:



JA 426a; *see also* Post-Conviction Relief Act Hearing ("PCRA") Tr. 11, 9/20/12 (a.m.) (trial prosecutor identifying District Attorney Castille's signature on this document as authorizing her to proceed on the death penalty).[2]

At trial, Mr. Williams' co-defendant, Mr. Draper, "was the sole Commonwealth witness to testify about the events leading up to Amos Norwood's death." JA 76a n.25. He testified that he and Petitioner beat Norwood to death and that the motive for the crime was robbery. The trial prosecutor also "elicited testimony from Draper indicating that his *only* agreement with the Commonwealth was that in exchange for his truthful testimony against [Petitioner], he would plead guilty to second degree murder, robbery and conspiracy for the murder of Amos Norwood." JA 155a-56a (emphasis in original). In the defense case, Mr. Williams, who met his new counsel the night before the trial, Trial Tr. 17-18, 22, 1/6/86, testified that he was not involved in the crime and did not know the deceased, *Commonwealth v. Williams*, 105 A.3d 1234, 1236 (Pa. 2014) (JA 17a). The jury convicted Petitioner of first-degree murder and robbery.

At the penalty phase, the Commonwealth presented evidence of Mr. Williams' prior convictions for an armed robbery and for the earlier third-degree murder. Defense counsel presented only three witnesses who gave "generic testimony" regarding "Williams' general good nature and athletic success." *Williams v. Beard*, 637 F.3d 195, 228 (3d Cir. 2011) (JA 317a).

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2. As explained *infra*, the memorandum reflecting District Attorney Castille's personal authorization of the death penalty was first disclosed in 2012.

Despite her knowledge that the victim had sexually abused Petitioner and other teenage boys, the trial prosecutor argued at the penalty phase that Mr. Williams "has taken two lives, two innocent lives of persons who were older and perhaps unable certainly to defend themselves against the violence that he inflicted upon them. He thought of no one but himself, and he had no reason to commit these crimes." Trial Tr. 1876-77, 2/3/86. She likewise argued that Mr. Williams killed the decedent "for no other reason but that a kind man offered him a ride home." Trial Tr. 1873, 2/3/86.

The sentencing jury found two aggravating circumstances – that the murder was committed during a robbery and that Mr. Williams had a significant history of violent felony convictions. The jury found no mitigating circumstances, even though Mr. Williams was just three months past his eighteenth birthday at the time of the offense. Accordingly, the jury sentenced Mr. Williams to death, the only available punishment under Pennsylvania law when at least one aggravating circumstance and no mitigating circumstances are found. 42 Pa. Cons. Stat. § 9711(c)(1)(iv).

On appeal, the Philadelphia District Attorney's Office filed a brief in the Pennsylvania Supreme Court. On the brief, District Attorney Castille was listed among counsel for the Commonwealth. JA 205a-06a. In 1990, the Pennsylvania Supreme Court affirmed Mr. Williams' convictions and death sentence. *Commonwealth v. Williams*, 570 A.2d 75, 84 (Pa. 1990) (JA 404a-05a).

B. Candidate Castille's Election to the Pennsylvania Supreme Court

After his tenure as District Attorney ended in 1991, Mr. Castille campaigned in 1993 for a seat on the Pennsylvania Supreme Court. In his election campaign, he stressed his record as Philadelphia's District Attorney, proclaiming his responsibility for the death sentences obtained during his tenure. As one reporter put it, "Castille [ran] a law-and-order campaign, touting his 45 death-penalty convictions and saying [his opponent] was soft on crime." Tim Reeves, "Castille Leads GOP Sweep of Courts," *Pittsburgh Post-Gazette*, Nov. 3, 1993, at A1, *available at* 1993 WLNR 2163040.[3]

Other reporters similarly recounted candidate Castille's proclamations that, as District Attorney, he "sent 45 people to death rows." Katharine Seelye, "Castille Keeps His Cool in Court Run," *Phila. Inquirer*, Apr. 30, 1993, at B1, *available at* 1993 WLNR 1997262; *see also* Lynn A. Marks & Ellen Mattleman Kaplan, "Disorder in the Courts," *Pittsburgh Post-Gazette*, Nov. 14, 1993, at B1, *available at* 1993 WLNR 2150772 ("Some candidates . . . skated perilously close to saying how they might be expected to rule on issues that could come before them as judge. Take, for example, Supreme Court Justice-elect Ron Castille – who, while pursuing a job requiring him to

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3. *See also* Frank Reeves, "Castille Preaches Law-and-Order Message to Voters," *Pittsburgh Post-Gazette*, Oct. 18, 1993, at B7, *available at* 1993 WLNR 2134084 ("Castille . . . hopes a law-and-order message . . . will help him win. . . 'When I start talking about court reform, people's eyes glaze over,' he said. 'When I tell them about (my) sending criminals to death row or how I fought the Mafia in Philadelphia, then they're interested.'" (alteration in original)).

hear death-penalty appeals, bragged that he sent 45 people to death row when he was a prosecutor."); Tim Reeves, "High Court Hopefuls Pressing for Change," *Pittsburgh Post-Gazette*, Oct. 17, 1993, at C1, *available at* 1993 WLNR 2117584 ("Castille and his prosecutors sent 45 people to death row during their tenure, accounting for more than a quarter of the state's death row population. Castille wears the statistic as a badge. And he is running for the high court as if it were exclusively the state's chief criminal court rather than a forum for a broad range of legal issues. . . . Castille talks about bringing a prosecutor's perspective to the bench . . . .").

When asked his position on the death penalty, "Castille says if candidates take positions then they'll have to recuse themselves from any decisions in those cases. . . . 'You ask people to vote for you, they want to know where you stand on the death penalty. *I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get the hint.*'" Lisa Brennan, "State Voters Must Choose Next Supreme Court Member," *Legal Intelligencer*, Oct. 28, 1993, at 1, 12 (emphasis added). Mr. Williams was the first of those 45 people.

C. Chief Justice Castille's Treatment of Recusal

Mr. Castille was elected and assumed his position as a justice on the Pennsylvania Supreme Court in January 1994. He was Chief Justice from 2008 through 2014, when he retired.[4] During his tenure on the court, some

4. In the interest of simplicity, we will refer to former Chief Justice Castille during his tenure on the court as "Chief Justice Castille," even with respect to events that took place prior to his elevation to Chief Justice.

defendants who had been prosecuted by his District Attorney's office sought his recusal from their appeals. Initially, Chief Justice Castille denied such motions by emphasizing that he was "not aware of any materials indicating that [he] personally reviewed petitioner's criminal file or otherwise personally participated in the prosecution of petitioner's matter as an advisor, or as a trial or appellate attorney," and had "no factual information about petitioner's underlying criminal case other than the knowledge and information contained in the petitions and briefs that [he] ha[d] reviewed." *Commonwealth v. Jones*, 663 A.2d 142, 144 (Pa. 1995) (recusal opinion of Castille, J.); *see Commonwealth v. Abu-Jamal*, 720 A.2d 121, 123 (Pa. 1998) (recusal opinion of Castille, J.) (similar); *Commonwealth v. (Roy) Williams*, 732 A.2d 1167, 1174 (Pa. 1999) (similar).

In *Commonwealth v. Rainey*, 912 A.2d 755 (Pa. 2006) (recusal opinion of Castille, J.), a recusal motion alleged for the first time that then-District Attorney Castille had personally authorized his office to seek the death penalty. Chief Justice Castille again denied the motion. He acknowledged that he played a role in the decision to seek the death penalty but stated that his role was merely ministerial. *See Rainey*, 912 A.2d at 757 (describing his role as one in which "my signature was affixed onto every indictment and complaint as an administrative formality").

Describing a process different from the review of aggravating and mitigating evidence employed in this case, Chief Justice Castille, in *Rainey*, asserted that each decision to seek the death penalty was reviewed by multiple supervisors in the District Attorney's office – the Chief of the Homicide Unit, the Trial Deputy, and the

First Assistant – and that their approval indicated *only* that "the trial prosecutor has demonstrated a statutory basis for seeking the death penalty." *Id.* (quoting from District Attorney's office's brief in opposition to recusal); *see also id.* at 758 (endorsing District Attorney's office's description of the approval practice as an "accurate description of the manner in which such decisions were made during my tenure"). He concluded that "[m]y formal approval of such recommendations from my assistants, recommendations approved at all levels in the chain of command, simply represented a concurrence in their judgment that the death penalty statute applied, *i.e.*, that one or more of the statutory aggravating circumstances set forth in the Sentencing Code, *see* 42 Pa.C.S. § 9711(d), existed, and nothing more." *Id.*

D. Petitioner's Initial Post-Conviction Proceedings

Petitioner filed a state post-conviction petition alleging, *inter alia*, that trial counsel was ineffective for failing to investigate and present mitigating evidence at the penalty phase of trial. The Commonwealth objected to and disputed Petitioner's attempts to show through indirect evidence that Mr. Norwood sexually abused Petitioner and other underage boys. In response to a question from the court, the Commonwealth averred that there was no evidence that Mr. Norwood had a sexually abusive relationship with Petitioner. *See* PCRA Tr. 237, 4/8/98. The post-conviction court denied relief. A divided Pennsylvania Supreme Court affirmed, with Chief Justice Castille joining the majority opinion. *Commonwealth v. Williams*, 863 A.2d 505, 523 (Pa. 2004) (JA 342a, 375a).

Mr. Williams filed a petition for habeas corpus relief in federal court, where the Commonwealth continued to attack the allegations of sexual abuse as unsupported. The district court found that trial counsel's failure to investigate and present mitigating evidence was deficient performance, but that the state court was not unreasonable in finding that Mr. Williams was not prejudiced. *Williams v. Beard*, No. 05-cv-3486, slip op. at *86-97 (E.D. Pa. May 7, 2007).

The Third Circuit affirmed. *Williams v. Beard*, 637 F.3d at 234-38 (JA 329a-338a). In finding that Petitioner was not prejudiced by counsel's performance, the court accepted the Commonwealth's attacks on the credibility of the sexual abuse evidence. JA 321 n.26 (deeming the Commonwealth's argument that the allegations of sexual abuse were unsupported to be "well taken" and factoring the argument "into our prejudice analysis accordingly"). This Court denied certiorari. *Williams v. Wetzel*, 133 S. Ct. 65 (2012).

E. The Findings of Prosecutorial Misconduct and *Brady* Violations in the 2012 Post-Conviction Proceedings

On March 9, 2012, Petitioner filed a successor state post-conviction petition based on new information from Petitioner's co-defendant, Mr. Draper, who had previously been unwilling to talk to Petitioner's counsel. Mr. Draper attested that, before trial, the Commonwealth had threatened to prosecute him for an unrelated, unsolved murder, and that in response to the Commonwealth's threats and demands, he testified falsely at trial that the homicide was motivated by robbery. Mr. Draper now

explained that the murder was actually motivated by the sexual abuse Mr. Williams had endured at the hands of Mr. Norwood, as Mr. Draper had informed the detectives and the prosecutor during the original investigation. PCRA Tr. 177-79, 181-88, 9/20/12 (p.m.). Moreover, Mr. Draper now admitted that he had received a previously undisclosed benefit in the form of a letter[5] the trial prosecutor had promised to and did write on his behalf to the parole board. PCRA Tr. 194-95, 9/20/12 (p.m.). This statement conflicted with evidence elicited by the prosecution at trial, where Mr. Draper testified that his *only* agreement with the Commonwealth was to testify truthfully and plead guilty to lesser offenses for Mr. Norwood's death. JA 155a-56a.

On August 8, 2012, Pennsylvania Governor Tom Corbett signed a warrant setting Mr. Williams' execution for October 3, 2012. The state post-conviction court held an evidentiary hearing, at which Mr. Draper and the trial prosecutor testified regarding Petitioner's allegations that the prosecution coerced Mr. Draper to testify falsely at trial; intentionally concealed reports and information that Mr. Norwood had sexually abused teenage boys, including Petitioner; made false arguments at capital sentencing that were contradicted by the undisclosed evidence; and continued throughout the appellate and post-conviction process to suppress and falsely deny the existence of evidence in its possession concerning Mr. Norwood's sexual predations.

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5. The letter was written on then-District Attorney Castille's letterhead. JA 208a.

The court ordered the District Attorney's office to produce previously undisclosed files of the prosecutor and police. The trial prosecutor's memorandum seeking approval to pursue a death sentence (bearing then-District Attorney Castille's handwritten authorization) was among the documents disclosed. The files also contained documents that provided, in the court's words, "[h]ard evidence" that "*directly* contradicted" the trial prosecutor's testimony. JA 150a (emphasis in original). At the close of the hearing, the state court made the following findings:

- the trial prosecutor – aware that the victim's sexual predations had prevented a first-degree murder conviction and death sentence in the prior case – "intentionally rooted out information" from the pretrial disclosures to the defense that would have "strengthened the inference of a homosexual connection between [Petitioner] and Amos Norwood," JA 152a;

- the trial prosecutor and police withheld evidence of Mr. Norwood's sexual misconduct with other teenage boys, both by completely failing to disclose evidence that he had groped a 16-year-old boy "on privates," JA 143a, and by providing "sanitized" versions of statements by the decedent's wife and Commonwealth witness Reverend Charles Poindexter, which omitted information about Mr. Norwood's conduct, JA 101a;

- the trial prosecutor and police coerced Mr. Draper to testify favorably by threatening to seek the death penalty against him with respect to an otherwise unrelated murder, JA 70a n.14;

- the trial prosecutor presented false evidence from Mr. Draper that the Norwood homicide was motivated only by robbery, rather than by the decedent's sexual abuse of Mr. Williams, JA 152a-53a;

- the trial prosecutor made a closing argument that "contradicted her own belief about the true nature" of the relationship between Petitioner and the deceased, JA 152a;[6]

- the trial prosecutor presented false evidence from Mr. Draper that his only deal with the Commonwealth was to testify in exchange for a guilty plea to second-degree murder, JA 155a, 159a; and

- the Commonwealth's suppression of evidence continued throughout, and undermined, the prior post-conviction proceedings in which the court had excluded Petitioner's proffered evidence of the deceased's sexual misconduct "[b]ased on the Commonwealth's affirmative misrepresentation," JA 86a-89a.[7]

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6. The court further noted: "Not only did [the trial prosecutor] keep these 'issues' from being presented to the empaneled jury, but she also chose the jury with an eye towards weeding out jurors who might have been sympathetic to victims of sexual impropriety." JA 152a n.11.

7. The court subsequently issued a written opinion consistent with its September 28, 2012 ruling from the bench. *Commonwealth v. Williams*, No. CP-51-CR-0823621-1984 (Pa. C.P. Nov. 27, 2012) (unpublished) (JA 64a). The court attached a separate "Appendix," which it explicitly made part of the opinion, detailing how the

The "hard evidence" supporting these findings included, for example, a note in the prosecutor's own handwriting about the alleged molestation of a sixteen-year-old boy by Mr. Norwood, and other evidence that parishioners had complained to Commonwealth witness Reverend Poindexter about Mr. Norwood's sexual conduct with underage boys. *See* JA 150a-51a.[8] The prosecutor was also found to have withheld information memorialized in multiple handwritten notes referencing the sexual nature of the case, including one about "continued investig[ation] for faggot squad"; a note that Mr. Draper "knew that Terry made $ by going to bed w/men"; and reminders to ask Mr. Draper "did he [Mr. Norwood] know Terry – liked boys," "did he like boys," and "how long had he known Terry," JA 90a n.38. Similarly, the letter the prosecutor wrote to the Parole Board concerning Mr. Draper's cooperation, pursuant to an undisclosed agreement with Mr. Draper, was withheld at trial. JA 144a.

The court found that the prosecutor's testimony was not credible, and that she "was less than candid," "engaged in 'gamesmanship,'" and "knowingly suppress[ed] evidence . . . in order to secure a first degree murder conviction and death penalty sentence." JA 75a n.23. The court further

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trial prosecutor's testimony before it and conduct during her prosecution of Petitioner led to its determination that she was "less than candid" during her testimony before the court. JA 75a n.23.

8. The trial prosecutor and the defense were permitted to review the prosecutor's file before she testified. JA 73a. However, the police file was not disclosed to the court or the defense until after the prosecutor testified that witnesses who were questioned about whether they knew of Mr. Norwood's sexual proclivities "all said no." PCRA Tr. 99, 106, 9/20/12 (p.m.).

found that the trial prosecutor played "fast and loose" with the truth, "took unfair measures to win," and "had no problem disregarding her ethical obligations," PCRA Tr. 37, 39, 45, 9/28/12, in violation of Petitioner's due process rights.

On September 28, 2012, the court granted a stay of execution and vacated Petitioner's death sentence based on Petitioner's claim that the prosecution withheld exculpatory evidence concerning Mr. Norwood's sexual abuse of other teenage boys in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).[9] That same day, the Commonwealth sought review of the ruling through an emergency application to the Pennsylvania Supreme Court to vacate the stay of execution.

On October 1, 2012, Petitioner filed an answer together with a motion requesting that Chief Justice Castille either recuse himself or refer the motion to the full court for decision, attaching, *inter alia*, the authorizing memorandum as an exhibit. JA 181a-82a, 204a. That same day, the Commonwealth filed a pleading opposing that request. JA 172a. Later that day, Chief Justice Castille issued a one-sentence order on the motion, which read: "AND NOW, this 1st day of October, 2012, [the] Motion for Recusal is DENIED, as is the request for referral to the full Court." JA 171a.

On October 3, 2012, the Pennsylvania Supreme Court denied the Commonwealth's application to vacate the

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9. While that is the only claim on which the post-conviction court granted relief, the court found that the other allegations of prosecutorial misconduct had been proved, but were not timely. JA 155a-59a & n.15.

stay and ordered full briefing on the issues raised in the appeal. Approximately two years later, on December 15, 2014, the court, without dissent, reversed the lower court's grant of penalty phase relief and lifted the stay of execution. *Williams*, 105 A.3d at 1244-45 (JA 36a). It rejected Petitioner's claims of government interference and *Brady* violations on procedural grounds – because Petitioner had not earlier discovered and developed the evidence himself, including the facts disclosed in the files of the prosecutor and police. *See* JA 28a-34a. As a result, the court deemed it unnecessary to address the extent and impact of the prosecutorial misconduct. *See* JA 28a ("[T]he failure to explore or exploit [Norwood's] character was not a *result* of government interference . . . ." (emphasis added)). Justices Saylor and Baer concurred in the result but did not join the court's opinion. JA 36a.

Chief Justice Castille joined the court's opinion and filed a lengthy concurring opinion, in which he posited that any prosecutorial misconduct is relevant only where the claim at issue is both timely and meritorious. JA 41a (Castille, C.J., concurring). Chief Justice Castille referred to a finding of a *Brady* violation as "condemning officers of the court," *id.* – *i.e.*, the trial prosecutor he formerly supervised and other members of his former office. Chief Justice Castille also characterized the lower court's grant of discovery as "seizing and rummaging about in the government's files." JA 47a.

On January 13, 2015, then-Governor Corbett issued a new death warrant for Mr. Williams, setting an execution date for March 4, 2015. On February 13, 2015, newly inaugurated Pennsylvania Governor Tom Wolf established

a moratorium on executions, pending the issuance of a report on Pennsylvania's death penalty system.[10]

SUMMARY OF ARGUMENT

The principle that judges must be fair, neutral, and impartial is essential to our adversarial system of justice. This principle was turned on its head in this case. The District Attorney who decided to seek the death penalty against Petitioner became the Chief Justice who reviewed a lower court's ruling that his prosecutor's office had committed misconduct in securing Petitioner's death sentence. Chief Justice Castille acted as a judge of his own case, depriving Petitioner of the process he was due.

It is also essential to our justice system that appellate review is conducted through private, collegial deliberations by panels of judges. Privacy permits judges on a tribunal to freely discuss, negotiate, and persuade each other of the appropriate ruling in a case. If one judge is tainted by bias, then the end result of this collective enterprise is a tainted judgment of the court. The influence of bias on such a judgment could be ascertained only by sacrificing the privacy necessary to effective decisionmaking. Review by a panel that contains a biased judge thus undermines the very structure of the judicial process. Here, that defect requires that the judgment of the Pennsylvania Supreme Court be vacated and the matter remanded for *de novo* review of the lower court's findings of prosecutorial misconduct, without Chief Justice Castille's participation.

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10. The Commonwealth is currently challenging this moratorium in the Pennsylvania Supreme Court. Oral argument on the Commonwealth's challenge was held on September 10, 2015. *Commonwealth v. Williams*, 14 EM 2015.

ARGUMENT

I. Chief Justice Castille's Refusal to Recuse Himself from the Review of the Commonwealth's Appeal Violated Due Process and the Eighth Amendment

Chief Justice Castille's involvement in this case – as the District Attorney who authorized seeking the death penalty, as a judge who reviewed the lower court's finding that his office committed misconduct that required a new sentencing, and as a candidate for judicial election who touted his obtaining death sentences in this and other cases – created a probability of bias that was constitutionally intolerable.

A. Due Process Requires an Objective Inquiry into Whether a Judge Is Likely To Be, or Appears To Be, Biased

A fair tribunal is essential to due process. *See In re Murchison*, 349 U.S. 133, 136 (1955). This principle "helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law," and "preserves both the appearance and reality of fairness." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (internal citation and quotations omitted). Moreover, in the capital context, the Eighth Amendment affords "heightened" due process protections to ensure the reliability of capital convictions and sentences. *See Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) ("'[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'" (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983))); *Beck v. Alabama*,

447 U.S. 625, 637 (1980) ("'It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, *and appear to be*, based on reason rather than caprice or emotion.'" (quoting *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (emphasis added))).

This Court has "jealously guarded" the right to an impartial tribunal, *Marshall*, 446 U.S. at 242, and has described the inquiry into whether a judge's bias violates due process as follows:

> The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.

Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 881 (2009) (internal quotations omitted).

The need for an objective standard is underscored by "the difficulties of inquiring into actual bias and the fact that the inquiry is often a private one." *Id.* at 883. To implement the principle that "no man is permitted to try cases where he has an interest in the outcome," *Murchison*, 349 U.S at 136, this Court has asked whether the relevant circumstances "offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant," or "might lead him not to hold the balance nice, clear, and true between the state and the accused." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

Due process requires disqualification only in "rare instances." *Caperton*, 556 U.S. at 887-88. These instances

come in different forms, but in each one, "'the average man as a judge'" would not likely be impartial. *Id.* at 878 (quoting *Tumey*, 273 U.S. at 532). A judge, for example, must recuse herself where she has a financial interest in the outcome of the case. *See Tumey*, 273 U.S. at 520 (mayor-judge received a salary supplement only for convictions); *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972) (similar); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 823-24 (1986) (disqualification required where state supreme court justice was plaintiff in almost identical insurance case in lower state court). Recusal may also be necessary as a result of events involving judicial elections, where a litigant's campaign contributions have a "significant and disproportionate influence" in placing a judge on a specific case. *Caperton*, 556 U.S. at 884, 887.

The probability of bias also requires recusal where a judge had significant prosecutorial involvement in a criminal case. For instance, in *Murchison*, the Court held that the same judge may not serve as both a "one-man grand jury" and as the trier of contempt charges that he initiated. 349 U.S. at 134 (internal quotations omitted); *see also Republican Party of Minn. v. White*, 536 U.S. 765, 776 (2002) (describing *Murchison* as holding that the "judge violated due process by sitting in the criminal trial of defendant whom he had indicted"). Such a single-judge grand jury amounts to participation in the "accusatory process," and "[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then to try the very persons accused as a result of his investigations." *Murchison*, 349 U.S. at 137; *see also Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971) (holding that a defendant in criminal contempt proceedings should be tried by "a judge other than the

one reviled by the contemnor"). A defining feature of our adversarial system of justice is "the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments . . . adduced by the parties." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 357 (2006). In short, no man should be "a judge in his own case." *Murchison*, 349 U.S. at 136.

Like these examples, this case is one of the "rare instances" that requires "resort to the Constitution." *Caperton*, 556 U.S. at 890; *see Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (comparing the constitutional requirement with stricter disqualification requirements under common law, statutes, and judicial codes of conduct).

B. Chief Justice Castille Was Objectively Likely To Be Biased

This case presents three objective circumstances that establish a probability of bias. First, then-District Attorney Castille personally decided to seek the death penalty against Mr. Williams. His office then obtained, and successfully defended on appeal, a death sentence. Second, the issue before the Pennsylvania Supreme Court in this case was whether his office committed misconduct in obtaining that death sentence, as the lower court had found. Alone and in combination, these first two circumstances establish "an unconstitutional potential for bias." *Caperton*, 556 U.S. at 881 (internal quotations omitted). Third, as a candidate for the Supreme Court, Mr. Castille "bragged that he sent 45 people to death row," Marks & Kaplan, "Disorder in the Courts," *supra* at B1, one of whom was Mr. Williams; and observed that voters

"'sort of get the hint'" about how he would rule in death penalty cases, Brennan, "State Voters Must Choose Next Supreme Court Member," *supra* at 12. Though protected by the First Amendment, his statements undermine "both the appearance and reality of fairness," *Marshall*, 446 U.S. at 242, by suggesting that, in this appeal, Chief Justice Castille would prejudge the validity of Mr. Williams' death sentence.

Given these three undisputed circumstances, the "average judge" in such a position was not "likely to be neutral." *Caperton*, 556 U.S. at 881 (internal quotations omitted). At a minimum, Chief Justice Castille's decision to preside over this appeal did not "satisfy the appearance of justice." *Murchison*, 349 U.S. at 136 (internal quotations omitted).

1. District Attorney Castille Personally Decided To Seek the Death Penalty

District Attorney Castille personally authorized the trial prosecutor to pursue a death sentence against Mr. Williams. His involvement in the prosecution and adjudication of Mr. Williams' case exemplifies the dual role of accuser and adjudicator that troubled this Court in *Murchison* and *Mayberry*, and which is foreign to our adversarial system:

> *Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.* While he would not likely have all the *zeal of the prosecutor*, it can certainly not be said that he would have none of

> that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.

Murchison, 349 U.S. at 137 (emphasis added); *see Mayberry*, 400 U.S. at 465. In such instances, "it is difficult if not impossible for a judge to free himself from the influence of what took place" previously. *Murchison*, 349 U.S. at 138.

The decision to seek the death penalty is one of the most solemn and important decisions a prosecutor can make because "the death penalty is different from other punishments in kind rather than degree." *Solem v. Helm*, 463 U.S. 277, 294 (1983). In Pennsylvania, as in most states, a District Attorney's decision to seek the death penalty "is the heart of the prosecution function," *Commonwealth v. DeHart*, 516 A.2d 656, 670 (Pa. 1986) (citations omitted); *see also* 16 Pa. Cons. Stat. § 1402, and is subject to the District Attorney's "broad discretion," *Commonwealth v. Stipetich*, 652 A.2d 1294, 1295 (Pa. 1995).[11]

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11. The significance of this decision has been widely recognized. *E.g.*, Hugo Adam Bedau, *Controversies from Prosecution to Execution, in The Death Penalty in America: Current Controversies* 313 (Hugo Adam Bedau ed., 1997) ("[T]he decision whether to seek the death sentence is perhaps the most far-reaching decision to be made in the whole arena of criminal justice."); David Wharton, "Asking for Death," *L.A. Times*, Feb. 24, 1985, *available at* http://articles.latimes.com/1985-02-24/local/me-24605_1_death-penalty-case (interviewing prosecutors on the decision to seek the death penalty, two of whom recounted: "[Y]ou realize your job really involves human life. It is an enormous responsibility."; "You weigh all these things and say, 'Is this the right guy for the death penalty?' . . . You don't want to be wrong.").

Chief Justice Castille's handwritten, personal authorization to pursue Mr. Williams' execution was not merely ministerial. To the contrary, while his subordinates recommended death and asked for his permission, then-District Attorney Castille made the final decision as to whether his office would seek the death penalty against Mr. Williams. JA 426a.

The memorandum – first disclosed in 2012 – also reveals a more involved approval process than previously acknowledged by the Chief Justice. *See supra* pp. 10-11 (describing Chief Justice Castille's opinion in *Rainey*). The trial prosecutor's memorandum is not limited to facts suggesting "that one or more of the statutory aggravating circumstances . . . existed, and nothing more." *Rainey*, 912 A.2d at 757-58. Rather, the memorandum addressed the likely presence of two statutory aggravating factors, *and* mitigating circumstances, *and* other aspects of the case that did not relate to any statutory aggravating factors. JA 424a-26a. The memorandum shows that, in contrast to the process described in *Rainey*, then-District Attorney Castille weighed whether seeking the death penalty was appropriate under the circumstances – not simply whether there was a statutory basis for the capital charge. There is no reason why these details would have been in the authorization-seeking memorandum if it were not understood that such information was relevant to District Attorney Castille's decision. The memorandum demonstrates that Chief Justice Castille's involvement was deliberate and significant, not an administrative formality.[12] In Chief Justice Castille's words: "I can

12. In contrast to his record of explaining, in prior opinions denying recusal, that recusal was unwarranted because he was not

certainly say *I sent* 45 people to death row." Brennan, "State Voters Must Choose Next Supreme Court Member," *supra* at 12 (emphasis added).

Moreover, the exercise of prosecutorial discretion is indispensable in administering capital punishment consistent with the Eighth Amendment. *McCleskey v. Kemp*, 481 U.S. 279, 311-13 & n.37 (1987). "[T]he capacity of prosecutorial discretion to provide individualized justice is firmly entrenched in American law." *Id.* at 312 (internal quotations omitted).[13] District Attorney Castille's exercise of this discretion cannot fairly be described as ministerial. *Cf. Bogan v. Scott-Harris*, 523 U.S. 44, 51 (1998) (ministerial acts are those in which government officials "lack[] discretion").

Where a prosecutor personally decides to seek the death penalty against a defendant, his later adjudication of that case as a judge violates due process. Such a dual

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"personally involved," *see, e.g., Rainey*, 912 A.2d at 757-58; *Jones*, 663 A.2d at 144, here, Chief Justice Castille provided no explanation for his decision not to recuse. *Cf. Caperton*, 556 U.S. at 882-86 (noting judge provided reasons for denying recusal and considering the reasons in analyzing due process claim). Chief Justice Castille also denied, without explanation, the request to refer the matter to the full court for review.

13. *See also* Jules Epstein, *Death-Worthiness and Prosecutorial Discretion in Capital Case Charging*, 19 Temp. Pol. & Civ. Rts. L. Rev. 389, 398 (2010) ("Prosecutorial discretion in deciding whether to seek the death penalty, either at the initial charging stage or thereafter in plea negotiations to withdraw the death notice in exchange for some quid pro quo, is a longstanding right and practice arguably essential to the continued function of the criminal trial process in most jurisdictions.").

role is also "fundamentally incompatible with the Eighth Amendment's heightened need for reliability in the determination that death is the appropriate punishment in a specific case." *Caldwell*, 472 U.S. at 340 (internal citations and quotations omitted).

2. Chief Justice Castille Reviewed Lower Court Findings of Prosecutorial Misconduct by His Former Office

The appeal before the Pennsylvania Supreme Court challenged lower court findings that the trial prosecutor employed and supervised by then-District Attorney Castille had committed misconduct material to Mr. Williams' sentencing. The lower court found that the District Attorney's office had coerced the prosecution's star witness to mislead the jury, presented false evidence and argument, and withheld favorable evidence of the victim's sexual predations – all while Chief Justice Castille was at the office's helm. If ever there was a case that "offer[s] a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused," *Caperton*, 556 U.S. at 878 (internal citations and quotations omitted), this is it.

Chief Justice Castille was "a judge in his own case." *Murchison*, 349 U.S. at 136. His interests and reputation were plainly implicated by the lower court's ruling that his office obtained Mr. Williams' death sentence by violating the law. The trial prosecutor was then-District Attorney Castille's subordinate and sought the death sentence at his direction. Chief Justice Castille thus had to pass judgment both on his former subordinate and on his own responsibility for his office's compliance with ethical and

constitutional obligations. Had he affirmed the lower court, Chief Justice Castille would have been admitting misconduct by his office. Such a clear nexus between the adjudicator and the issue being adjudicated cannot avoid the appearance or probability of bias:

> Given the institutional ties described here, the reasonable person might well question whether a judge who bore supervisory responsibility for prosecutorial activities during some of the time at issue could suppress his inevitable feelings and remain impartial when asked to determine [the propriety of his former office's actions], and to preside over whatever enquiry may ultimately be conducted.

In re Bulger, 710 F.3d 42, 48-50 (1st Cir. 2013) (Souter, J., sitting by designation) (ordering removal of judge who had a supervisory prosecutorial position during the investigation of the case).

Here, Chief Justice Castille judged his own office's culpability. His participation in the appeal created too much potential that extra-record knowledge of the facts, circumstances, or people involved in the events would influence his judgment and decision in the case. *See Murchison*, 349 U.S. at 138 ("Th[e] incident . . . shows that the judge was doubtless more familiar with the facts and circumstances in which the charges were rooted than was any other witness.").

This Court has found due process violated on facts much less egregious than these. *See, e.g., id.* at 134-35 (requiring disqualification where judge played a

prosecutor-like role in a defendant's charge of contempt). Because Chief Justice Castille presided over this case between his former office and the man against whom he had sought the death penalty, and because the case concerned his own office's misconduct in securing the death sentence, Mr. Williams was denied "impartial, equal, exact justice." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866) (statement of Representative John Bingham, principal drafter of the Fourteenth Amendment, explaining the amendment's purpose).

Due process is violated where a judge participates in reviewing findings of prosecutorial misconduct committed under his supervision by his former subordinate. When combined with the fact that the judge personally authorized the subordinate to seek the death penalty in the same case, the constitutional violation is even more pronounced.

3. Candidate Castille Touted the Death Sentences He Obtained as District Attorney

The probability of bias is greater still in light of then-candidate Castille's statements during his election campaign. Running on a get-tough approach to criminal justice, he adverted explicitly to – and took credit for – the death verdicts he had secured as District Attorney. When asked about his position on death penalty cases, Chief Justice Castille cited the number of people he "sent" to death row and explained that the voters "sort of get the hint." Brennan, "State Voters Must Choose Next Supreme Court Member," *supra* at 12. To enhance the hint, Chief Justice Castille invoked raw numbers – "45"

death sentences to be exact – a number that included Mr. Williams' death sentence. *See id.*

While Chief Justice Castille had the right to express his pro-death penalty approach to criminal justice, his electoral platform emphasized his personal decisions to seek the death penalty, undermining his own portrayal of such decisions as merely ministerial and heightening the concerns raised by his unexplained decision to preside over the appeal in this case. His public remarks are one more factor in the objective inquiry pointing to the appearance and probability of bias. Given the circumstances, recusal was necessary to ensure public confidence in the impartiality of the judiciary. *Cf. White*, 536 U.S. at 794-96 (Kennedy, J., concurring) (while judicial candidates' speech is protected, recusal may be used to insure judicial impartiality); *see also Republican Party of Minn. v. White*, 416 F.3d 738, 755 (8th Cir. 2005) (en banc) (on remand) ("Through recusal, the same concerns of bias or the appearance of bias that [the state] seeks to alleviate through [its regulation of political speech and association] are thoroughly addressed without 'burn[ing] the house to roast the pig.'" (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957))).

The objective circumstances of this case may well establish actual bias. At the very least, the undisputed facts establish there was "an unconstitutional potential for bias." *Caperton*, 556 U.S. at 881 (internal quotations omitted).

C. Chief Justice Castille's Refusal to Recuse Lies Far Outside the Mainstream of Judicial Ethics

Undersigned counsel is not aware of any prior case in the nation where a judge presided under circumstances equivalent to those described above. Chief Justice Castille's refusal to recuse placed him far outside the mainstream of judicial ethics and reported decisions.

Many state courts, including the Pennsylvania Supreme Court, have recognized that significant, personal involvement in a case as a prosecutor disqualifies a jurist from subsequently presiding over the same case. *Commonwealth ex rel. Allen v. Rundle*, 189 A.2d 261, 262 (Pa. 1963) (disqualification required where judge, as District Attorney, signed an indictment and was responsible for the prosecution of the charge against the defendant); *see, e.g.*, *Green v. State*, 729 S.W.2d 17, 20 (Ark. App. Ct. 1987) (disqualification required where the judge, as prosecutor, signed the plea and sentence recommendation); *People v. Julien*, 47 P.3d 1194, 1198 (Colo. 2002) (disqualification required where judge, as prosecutor, participated in the investigation or presentation of case, had "other involvement with the case, such as being a supervising attorney of the attorneys conducting the prosecution, or gain[ed] personal knowledge of disputed evidentiary facts of the case . . . ."); *State v. Connolly*, 930 So.2d 951, 954-55 (La. 2006) (similar); *Banana v. State*, 638 So.2d 1329, 1330-31 (Miss. 1994) (similar); *Mathis v. State*, 3 Heisk. 127, 128 (Tenn. 1871) (disqualification where the judge, as District Attorney, signed the indictment against petitioner); *In re K.E.M.*, 89 S.W.3d 814, 828-29 (Tex. App. 2002) (disqualification required where record shows "(1) personal participation by the judge as prosecutor in any

way, however slight, in the investigation or prosecution of the same case . . . ; or (2) supervisory authority by the judge as prosecutor at the time the case was investigated, prosecuted, or adjudicated over attorneys who actually investigated or prosecuted the same case").

Other state courts have gone even further, holding that disqualification is required where the judge was the District Attorney – without demonstrated personal involvement in the case – at the time that the defendant was prosecuted. *See, e.g., State ex rel. Corbin v. Super. Ct. of Ariz.*, 748 P.2d 1184, 1186 (Ariz. 1987) (disqualification required because "[t]he presence of a former member of the prosecutor's staff on the bench at the capital sentencing of a case which has been prosecuted by that judge's former office raises substantial and unavoidable questions"); *King v. State*, 271 S.E.2d 630, 633-34 (Ga. 1980) (disqualification required where judge was District Attorney during the time that petitioner's case was pending); *McElroy v. State*, 133 P.2d 900, 902-03 (Okla. 1943) (similar); *cf. Ohio v. Dickerson*, No. L-91-214, 1993 WL 195806, at *2 (Ohio App. Ct. 2003) (unpublished) (remanding judicial bias claim where judge had been Chief of the District Attorney's Criminal Division at the time of defendant's capital case).

Similarly, federal judges are required to recuse when they "[have] served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." 28 U.S.C. § 455(b); *see, e.g., Laird v. Tatum*, 409 U.S. 824, 829 (1972) (Rehnquist, J.) (mem. op.) (noting that, in *S & E Contractors, Inc. v. United States*, 406 U.S.

1 (1972), a case "in which I had only an *advisory* role which terminated immediately *prior* to the commencement of the litigation, I disqualified myself" (emphasis added)); *United States v. Vasilick*, 160 F.2d 631, 632 (3d Cir. 1947) (disqualification where judge signed the defendant's indictment as the District Attorney).

Many prosecutors-turned-judges, recognizing the potential for bias or the appearance of bias, have sought ethics opinions in far less extreme circumstances than those presented here; these ethics opinions uniformly require recusal. *See, e.g.*, *JEAC 2007-3*, 2007 WL 7603074, at *2, *5 (Del. Jud. Ethics Advisory Comm. June 29, 2007) (advising a former Attorney General that he is disqualified not only from all matters where, as Attorney General, he "had direct substantial involvement or made a direct, substantial decision," but also "from presiding over criminal cases that were filed by deputy attorneys general, without input from the Attorney General, during the judge's tenure in that office"). In many states, disqualification is necessary where a judge had no involvement in the prosecution except that the case was charged while the judge was the District Attorney. *See, e.g.*, *Advisory Op. 06-01*, 2006 WL 1148131, at *1 (Ariz. Sup. Ct. Jud. Ethics Advisory Comm. Apr. 18, 2006) ("[A] judge, whose name appeared on the charging document or other court papers while serving as chief city prosecutor, should recuse himself from any case originating or pending in the prosecutor's office while he held a supervisory position there."); *Advisory Op. # 3-89*, 1989 WL 1712315, at *1 (Ind. Comm. Jud. Qual.) (similar); *Mich. Eth. Op. JI-34*, 1990 WL 505821, at *1 (Mich. Prof'l Jud. Ethics Dec. 21, 1990) (similar); *Op. 09-3*, 2009 WL 8484514, at *1 (Wis. Sup. Ct. Jud. Conduct Advisory Comm. Aug. 6, 2009)

(similar); *see also Advisory Op.* (W. Va. Jud. Investigation Comm'n Jan. 5, 1993), http://www.courtswv.gov/legal-community/advisory-opinions.htm ("A judicial officer may not hear criminal cases handled by a prosecutor's office during the judicial officer's prior employment with that office."). That Chief Justice Castille's decision was so far outside the mainstream of judicial ethics emphasizes the extraordinary nature of this case and the need for constitutional protections.

* * *

For all of the reasons discussed above, the facts of this case are constitutionally intolerable. Chief Justice Castille violated the fundamental principle that no man shall be a judge of his own case. If due process requires recusal in cases in which a judicial candidate received substantial amounts of money in campaign support from a potential litigant, or in which a judge sat as a grand jury in proceedings that served as the basis for contempt charges, then it must require recusal in this case, in which the Chief Justice was to decide issues of prosecutorial misconduct that occurred under his supervision in a case where he personally authorized the decision to seek the death penalty.

II. Due Process and the Eighth Amendment Require Relief from the Decision of a Tribunal That Included a Biased Jurist

This case presents the question left open in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 827-28 (1986) – whether relief is required where due process was violated by a judge's participation in a case, but the judge did not

cast the deciding vote. *See id.* at 827 ("Our prior decisions have not considered the question whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case.").

Three concurring Justices in *Lavoie* recognized the correct answer: yes. As they opined, the "mere participation in the shared enterprise of appellate decisionmaking – whether or not [the improperly seated judge] ultimately wrote, or even joined, the [court's] opinion – posed an unacceptable danger of subtly distorting the decisionmaking process." *Id.* at 831 (Blackmun, J., joined by Marshall, J., concurring); *accord id.* (Brennan, J., concurring) ("The description of an opinion as being 'for the court' connotes more than merely that the opinion has been joined by a majority of the participating judges."). Where the right to an impartial tribunal is violated by the presence of a biased member, the error undermines the very structure of the adjudicative process and threatens public confidence in the integrity of the judiciary. The majority of courts to consider the question have adopted this view, and social science research confirms it. Judges are influenced by the other judges on multimember tribunals. Moreover, it is impossible to isolate and evaluate the influence of the biased participant on the court's deliberations without abrogating the confidentiality necessary to the proper functioning of the courts. Here, Chief Justice Castille's participation in the appellate decisionmaking in this case impermissibly tainted the Pennsylvania Supreme Court's decision.

A. A Violation of the Right to an Impartial Tribunal Is Structural Error

A violation of the right to an impartial tribunal has long been recognized as structural error. *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) ("No matter what the evidence was against him, he had the right to have an impartial judge."); *Turner v. Louisiana*, 379 U.S. 466, 473 (1965) ("it would be blinking reality not to recognize the extreme prejudice inherent" in contact between jurors and prosecution witnesses throughout trial); *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986) ("[T]hese fundamental flaws, which . . . undermine[] the structural integrity of the criminal tribunal itself, [are] not amenable to harmless-error review."); *Rose v. Clark*, 478 U.S. 570, 577 (1986) ("[S]ome constitutional errors require reversal without regard to the evidence in the particular case [including] . . . adjudication by biased judge[]." (internal citations omitted)). Any suggestion that the error in Chief Justice Castille's participation in this case can be corrected by harmless error analysis, *see* Br. Opp'n at ii (contending that this Court should "apply the harmless-error doctrine to constitutionalized recusal claims"), is inconsistent with this authority.

This Court has identified two attributes of structural errors. First, a structural error affects "the entire adjudicatory framework." *Puckett v. United States*, 556 U.S. 129, 141 (2009); *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 148 (2006) ("[S]tructural defects . . . affect the framework within which the trial proceeds . . . ." (internal citations and quotations omitted)). The collegial decisionmaking process is an essential part of the "adjudicatory framework" of any multimember court

proceeding. Thus, where the shared decisionmaking process is infected with bias, the "entire adjudicatory framework" of the appeal is undermined. Just as it would be "blinking reality" to suggest that a jury's verdict should stand where its deliberations were improperly influenced by one party, *Turner*, 379 U.S. at 473, so too an appellate court's decision cannot stand where a biased judge was part of its decisionmaking process.

Second, structural errors are those for which the "'consequences . . . are necessarily unquantifiable and indeterminate.'" *Gonzalez-Lopez*, 548 U.S. at 150 (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)); *see also Waller v. Georgia*, 467 U.S. 39, 49 n.9 (1984) (violations of the right to a public trial are structural because "the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance"). Appellate courts function effectively as institutions only because their deliberations occur *in private*, and the unquantifiable nature of a single judge's influence on deliberations is a necessary consequence of such privacy. If privacy were sacrificed in favor of a harmless error analysis, it would require "a speculative inquiry into what might have occurred in an alternate universe." *Gonzalez-Lopez*, 548 U.S. at 150.

Here, the only reliable way to remove Chief Justice Castille's influence from the case is by vacating the Pennsylvania Supreme Court's decision and remanding for *de novo* reconsideration of Petitioner's appeal.[14] Chief

14. Chief Justice Castille's tenure on the court ended on December 31, 2014, two weeks after the decision in this case. In November 2015, three new justices were elected and will take seats on the court in January 2016.

Justice Castille's participation in the deliberations and decisionmaking in this case injected a probability and appearance of bias that was structural error and denied Petitioner's rights under the Eighth and Fourteenth Amendments.

B. The Principle of Judicial Impartiality Encompasses a Judge's Participation in a Case, Not Just the Judge's Vote

As set forth above, given the collegiality of appellate court deliberations, the bias of one judge affects the adjudicatory framework of an appeal, and the private nature of the deliberations makes it impossible to discern the impact of improper influence. These same attributes – collegiality and privacy – also illustrate why the public would doubt the impartiality of a tribunal on which a biased judge sat (or, as here, over which he presided).

The duty to recuse has never been understood to be confined to a judge's vote; rather, it requires that the judge refrain from participating in the case at all. When a biased judge fails to recuse, however, her participation in the consideration of a case calls into question the legitimacy of the court, which "ultimately depends on its reputation for impartiality." *Mistretta v. United States*, 488 U.S. 361, 407 (1989). The purpose of the Due Process Clause is to ensure the provision of "impartial, equal, exact justice," Cong. Globe, 39th Cong., 1st Sess. 1094 (1866), but the public will naturally doubt the "impartial, equal, exact justice" of a court's decision when a biased judge participated in the decisionmaking process.

A court's power is institutional, not personal. "The description of an opinion as being 'for the court' connotes more than merely that the opinion has been joined by a majority of the participating judges." *Lavoie*, 475 U.S. at 831 (Brennan, J., concurring). As Circuit Judge Harry Edwards has written, "appellate judges act collectively as a court in disposing of cases," and "each judge can only contribute to a group product that is ultimately attributable to the court." Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. Pa. L. Rev. 1639, 1656, 1661 (2003). Because an appellate decision is an exercise of institutional power, bias and the appearance of bias affect the integrity of a court to the same extent that they affect any judge sitting on the court.

"[T]he hallmark of multimember courts" is that they undertake a shared decisionmaking process. *Lavoie*, 475 U.S. at 833 (Blackmun, J., concurring). Judges "exchang[e] ideas and arguments in deciding the case," and this "collective process of deliberation . . . shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed." *Id.* at 831 (Brennan, J., concurring). This observation has been confirmed by numerous social science studies conducted since *Lavoie*, which have produced overwhelming evidence that the collegial decisionmaking process influences how judges on multimember courts rule. *See infra* Part II.D. Accordingly, "mere participation in the shared enterprise of appellate decisionmaking – whether or not [the improperly seated judge] ultimately wrote, or even joined, the [tribunal's] opinion – pose[s] an unacceptable danger of subtly distorting the decisionmaking process." *Lavoie*, 475 U.S. at 831 (Blackmun, J., concurring).

This collegial process occurs out of public view. Thus, "based on objective and reasonable perceptions," *Caperton*, 556 U.S. at 884, a court's "reputation for impartiality," *Mistretta*, 488 U.S. at 407, will be undermined because the biased judge's influence on the court cannot be divined. The private nature of court deliberations makes it impossible for the public to determine "the actual effect a biased judge had on the outcome of a particular case," *Lavoie*, 475 U.S. at 833 (Blackmun, J., concurring), jeopardizing the public's confidence in judicial integrity.

The public therefore would have reason to doubt the impartiality of a multimember court on which a biased judge sat for the same reasons that this Court has held certain errors to be "structural." An error that undermines a court's collaborative process of deliberation and its unitary institutional voice plainly "affects the framework within which the [case] proceeds." As a court's deliberative process is confidential, such errors "are necessarily unquantifiable and indeterminate" and thus "unquestionably qualif[y] as structural error." *Gonzalez-Lopez*, 548 U.S. at 148-50 (internal quotations and alterations omitted).

C. Most Courts Apply the Structural Error Doctrine in These Circumstances

The vast majority of federal and state courts to consider the question have ruled that a tribunal decision cannot stand where due process required one judge's recusal, even though the judge did not cast the deciding vote. This case law provides strong evidence that public confidence in the impartiality of courts would be eroded by a contrary rule that permitted such a court decision to stand.

Six federal circuits have endorsed the principle that, where due process requires disqualification of one tribunal member, the tribunal's decision is tainted because "there is no way which we know of whereby the influence of one upon the others can be quantitatively measured." *Berkshire Emps. Ass'n v. NLRB*, 121 F.2d 235, 239 (3d Cir. 1941); *see Stivers v. Pierce*, 71 F.3d 732, 747-48 (9th Cir. 1995) ("The plaintiff need not demonstrate that the biased member's vote was decisive or that his views influenced those of other members. . . . [B]ias on the part of a single member of a tribunal taints the proceedings and violates due process."); *Hicks v. City of Watonga*, 942 F.2d 737, 748 (10th Cir. 1991) (citing and adopting the view of *Berkshire Emps. Ass'n*); *Antoniu v. SEC*, 877 F.2d 721, 726 (8th Cir. 1989) (proceedings were "nullified" because "there is no way of knowing" how tainted member's participation affected deliberations); *Cinderella Career & Finishing Schs., Inc. v. FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970) ("we adopt the position of our sister circuits on this point," citing *Berkshire Emps. Ass'n*, *supra*, and *Am. Cyanamid Co. v. FTC*, *infra*); *Am. Cyanamid Co. v. FTC*, 363 F.2d 757, 767-68 (6th Cir. 1966) (tribunal's decision tainted although biased member's "vote was not necessary for a majority").

Federal district courts in other circuits have followed the majority rule. *See Howell v. Marion Sch. Dist. One*, No. 4:07-cv-1811-RBH, 2009 WL 764445, at *7-*8 (D.S.C. Mar. 19, 2009) (observing that "a majority of the circuits to address the question have held that a decision issued by a multi-member panel must be vacated if a biased member participated in the decision" and "find[ing] the reasoning of the majority of courts addressing the issue to be persuasive"); *Butler v. Oak Creek-Franklin Sch. Dist.*,

172 F. Supp. 2d 1102, 1117 & n.5 (E.D. Wis. 2001) (noting that "five of the six circuits to address this question have held that the panel decision must be vacated" and following the majority rule).

Only one circuit has ruled otherwise. In *Bradshaw v. McCotter*, 796 F.2d 100 (5th Cir. 1986), a federal habeas proceeding brought by a state prisoner, the Fifth Circuit read *Lavoie* as having "emphasized in its opinion that the [improperly seated] justice's 'vote was decisive in the 5 to 4 decision.'" *Id.* at 101 (quoting *Lavoie*, 475 U.S. at 828). Without analysis, and without acknowledging the *Lavoie* concurrences, the Fifth Circuit concluded that "[l]acking a showing in this case that [the improperly seated judge's] vote was controlling, no prejudice has been shown." *Id.* The Fifth Circuit's conclusory holding misread *Lavoie* as having decided the very question that this Court declined to resolve.

Most state courts to address the question have endorsed the majority rule. *See Nationwide Mut. Ins. Co. v. Clay*, 525 So.2d 1339, 1340-41 (Ala. 1987) (following remand from this Court for reconsideration in light of *Lavoie*, Alabama Supreme Court rejected argument that its prior 6-3 decision could be affirmed and instead ruled that "a true 'appearance of justice' mandated" *de novo* redetermination of the case without the disqualified judge); *Sullivan v. Mayor of Elsmere*, 23 A.3d 128, 136 (Del. 2011) (adopting the "prevailing perspective . . . that the bias of one member of a multi-member adjudicatory tribunal taints the entire tribunal's decision and deprives the party subject to the tribunal's judgment of due process"); *Crump v. Bd. of Educ.*, 392 S.E.2d 579, 588 (N.C. 1990) ("One biased member can skew the entire process by

what he or she does, or does not do, during the hearing and deliberations."); *PETA v. Bobby Berosini, Ltd.*, 894 P.2d 337, 341-42 (Nev. 1995) ("Although Judge Lehman's vote in this case could be considered mere surplusage because three other justices of this court signed the opinion, we conclude that the role that collegiality plays in appellate decisions mandates full reconsideration of this matter."), *overruled in part on other grounds by Towbin Dodge, LLC v. Eighth Judicial Dist. Ct.*, 112 P.3d 1063, 1069-70 (Nev. 2005); *Kiger v. Albon*, 601 N.E.2d 603, 607 (Ohio 1991) ("[W]e adopt the reasoning of the *American Cyanamid* case and find [the] participation [of a biased tribunal member whose vote was not necessary to the required majority] to be a fundamental violation of due process and inherently prejudicial.").

Other state courts have vacated tribunal decisions based on the specific circumstances of those cases, without adopting or rejecting the majority rule. *See Johnson v. Sturdivant*, 758 S.W.2d 415, 415-16 (Ark. 1988) (vacating opinion written by disqualified author and recusing all justices from further consideration of the case); *Tesco Am., Inc. v. Strong Indus., Inc.*, 221 S.W.3d 550, 556 (Tex. 2006) ("[T]he judgment must be reversed because the opinion on which it was based was authored by a justice who was constitutionally disqualified; it would be stretching the Constitution too far to simply assume she was not involved.").

Only Pennsylvania has squarely embraced the minority rule. *See Goodheart v. Casey*, 565 A.2d 757, 762 (Pa. 1989). In *Goodheart*, as in the Fifth Circuit's opinion in *Bradshaw*, the Pennsylvania Supreme Court incorrectly read *Lavoie* as having "recognized the judgment need not

be disturbed where the participating 'interested' judges' votes were mere surplusage." *Id.* at 761. The Pennsylvania Supreme Court ruled that the votes of the two justices in *Goodheart* were "surplusage" because the votes were not decisive in the results, neither justice authored the court's opinions, and the court's opinions were not precedential. *Id.* at 761-62. The Pennsylvania Supreme Court neither acknowledged this Court's explicit deferral of the question in *Lavoie*, nor addressed the impact that the interested judges had on the court's deliberations.

The clear weight of precedent from state and federal courts endorses the view that such errors are structural. Commentators do the same. *See, e.g.*, Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 Harv. L. Rev. 80, 102 (2009) ("Justice Benjamin's participation would have tainted the impartial administration of justice even if the state court had upheld the jury's verdict by a vote of four to one with Justice Benjamin in the dissent or had overturned the verdict by a supermajority that included him."); Ronald Rotunda, *Judicial Disqualification in the Aftermath of* Caperton v. A.T. Massey Coal Co., 60 Syracuse L. Rev. 247, 253 (2010) ("[O]ne should not conclude that *Lavoie* is limited to cases that are closely divided."); *accord* John R. Allison, *Ideology, Prejudgment, and Process Values*, 28 New Eng. L. Rev. 657, 714 (1994); Penny J. White, *Relinquished Responsibilities*, 123 Harv. L. Rev. 120, 145 (2009).

D. Social Science Research Supports the Majority Rule

Since *Lavoie*, "voluminous recent literature" has found that "judges' views are quite often influenced by

the composition of the courts on which judges sit." Karlan, *supra* at 102 n.121 (collecting citations). These studies, examining what are known as "panel effects," confirm not only that intragroup influence is real but also that it cannot be parsed with precision, particularly after the fact; thus the consequences of a failure to recuse "'are necessarily unquantifiable and indeterminate.'" *Gonzalez-Lopez*, 548 U.S. at 150 (quoting *Sullivan*, 508 U.S. at 282).

Studies demonstrate that "judges participating in a group decision concur with judicial outcomes that they would not have pronounced on their own – a behavioral phenomenon that can generally be referred to as 'conformity effects.'" Tomer Broude, *Behavioral International Law*, 163 U. Pa. L. Rev. 1099, 1147 (2015). Such effects are inherent in multimember courts. "[B]oth anecdotal and systematic evidence make clear that there is an affective component to the interactions between and among judges serving on appellate courts." Wendy L. Martinek, *Judges as Members of Small Groups*, in *The Psychology of Judicial Decision Making* 73, 75 (David E. Klein & Gregory Mitchell eds., 2010). Martinek explains: "[I]ndividuals participating in group decision making processes are susceptible to conformity effects," at least in part because "members of a group care about the evaluations of their fellow group members." *Id.* at 82; *see also* John W. Cooley, *How Decisions Are Made in Appellate Courts*, 26 Judges' J. 2, 3-4 (1987) ("[W]hat we all have long believed to be 'appellate decision making' is truly negotiation on a higher plane.").

A study of federal courts revealed that "[t]hese panel effects can be dramatic. In some areas of law, the political orientation of the other judges on a panel is an even better

predictor of a judge's vote than is the judge's own political orientation." Ahmed E. Taha, *How Panels Affect Judges: Evidence from United States District Courts*, 39 U. Rich. L. Rev. 1235, 1252 (2005). Although some commentators, including Judge Edwards, question such *explanations* for these effects, they do not doubt that the effects are real. *See* Edwards, *supra* at 1660-61 ("It is a complex conversation, both in conference and during the drafting of opinions, in which judges, individually and collectively, often come to see things they did not at first see and to be convinced of views they did not at first espouse.").[15] Suffice it to say, "the evidence of panel effects is overwhelming." Emerson H. Tiller, *The Law and Positive Political Theory of Panel Effects*, 44 J. Legal Stud. S35, S56 (2015).

Evidence of panel effects is particularly strong with respect to presiding judges. A presiding judge has more influence on the decisionmaking of colleagues than do the other judges on a court. *See* Edwards, *supra* at 1670 ("[P]eople tend to follow the suggestions of their leadership. This finding resonates with my experience as Chief Judge of my court from 1994 to 2001."); Theodore Eisenberg *et al.*, *Group Decision Making on Appellate Panels: Presiding Justice and Opinion Justice Influence in the Israel Supreme Court*, 19 Psychol. Pub. Pol'y & L. 282, 293 (2013) (study finding that "a presiding justice's colleagues are 31% more likely to vote in the direction of the presiding justice than their voting pattern suggests when the justice does not preside"); Stacia L. Haynie, *Leadership and Consensus on the U.S. Supreme Court*,

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15. Judge Edwards collected articles by numerous other judges, including Justices on this Court, discussing the group decisionmaking process. *See* Edwards, *supra* at 1641 n.10.

54 J. Pol. 1158, 1166 (1992) (finding that the leadership of the Chief Justice of the United States affected the likelihood of coming to a consensus); Martinek, *supra* at 79 (describing the influence that formal leadership roles have on group decisionmaking). These studies indicate that there is an objectively greater risk of such influence due to his role as Chief Justice.[16]

One consequence of the collegial decisionmaking process is that unanimous decisions are the norm:

> The vast majority of cases in the federal courts of appeals elicit no dissent. Even in the Supreme Court, which has a central mission of resolving cases that have divided lower courts, the justices decide many cases unanimously. In the Court's 2013 term, the unanimity rate reached 64 percent.

Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. Chi. L. Rev. 1235, 1298 (2015); *see also* Pauline T.

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16. The Chief Justice of Pennsylvania has significant administrative powers, including the power to assign the drafting of opinions. *See* Pa. Sup. Ct. Internal Operating Procedures § 3(A)(3) ("The Chief Justice shall preside at the conference, lead the Court's discussion, and call for a tentative vote on the decision of each case."); *id.* at § 3(B) ("The Chief Justice will assign submitted cases in a rotation schedule by seniority . . . . Capital PCRA appeals shall be assigned in a separate rotation, to ensure an even distribution of responsibility in those appeals. If it appears that there is an unequal distribution of cases or a delay in deciding cases, the Chief Justice may, as a matter of his or her discretion, alter the assignment order.").

Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. Pa. L. Rev. 1319, 1331 (2009) (noting that "the proportion of federal appellate decisions containing dissents is quite low – around 10%"); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 Sup. Ct. Econ. Rev. 1, 20 (1993) ("Even in a three-judge panel, provided that at least one judge has a strong opinion on the proper outcome of the case, or even that a law clerk of one judge has a strong opinion on the matter, the other judges, if not terribly interested in the case, can simply cast their vote with the 'opinionated' judge.").

Unanimous decisions are the typical goal of the group decisionmaking process. *See* Cooley, *supra* at 6 (survey of judges in which 100 percent responded that they strive for unanimity in important cases, confirming "the findings of previous research that appellate judges . . . do strive for unanimity – an agreed solution to the problem"); *see also* Posner, *supra* at 19-21; Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1377 (1995) ("[C]onsensus is a formidable constraint on what an opinion writer says and how she says it."); Diane P. Wood, *When To Hold, When To Fold, and When To Reshuffle: The Art of Decision-Making on a Multi-Member Court*, 100 Calif. L. Rev. 1445, 1462-63 (2012) (discussing "Chief Justice Earl Warren's efforts to ensure that *Brown v. Board of Education* would be issued as a unanimous decision, to deflect any concern at all that it was driven by politics rather than law . . . . [S]eparate opinions may create tension among the members of the court. . . . Most judges will therefore think carefully before writing separately, even if they sincerely

disagree with some or all of the proposed opinion."). Unanimous appellate decisions, including the decision in this case, do not undermine the proposition that judges influence each other's votes – they confirm it. Unanimity conceals negotiation, deliberation and disagreement; it can also conceal the corrosive influence of bias.

In sum, extensive research since *Lavoie* – much of it by, or based on the experiences of, judges – confirms that multimember courts typically issue decisions based on the influence and input of every judge on the court. A presiding judge's influence is even greater than that of the other judges, and unanimity is the usual goal of this group decisionmaking process. This research confirms the likelihood, and the objective observer's perception, that Chief Justice Castille influenced the other justices on the Pennsylvania Supreme Court in this case.

CONCLUSION

For the foregoing reasons, the judgment of the Pennsylvania Supreme Court should be vacated, and the case remanded for the Pennsylvania Supreme Court to conduct *de novo* review without the participation of Chief Justice Castille.

Respectfully submitted,

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No. 15-5040

In the Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

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Capital case

Questions presented

1. Whether the Constitution dictated disqualification of a state supreme court justice because of his brief administrative involvement in the case as an elected district attorney 29 years earlier.

2. Whether the Constitution invalidated the votes of every other justice in the unanimous decision below.

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Introduction

Twenty-nine years before the appellate decision below, Justice Ronald Castille of the Pennsylvania Supreme Court had a different job. He was the elected District Attorney of Philadelphia. He led a staff of almost 500, including 225 attorneys. In that capacity, it was his duty to sign off on a large variety of official documents – including memos recommending the death penalty in murder cases – that were passed up the chain of command for his signature. During his five-year tenure, there were scores of such capital authorization memos, including one in this prosecution. His signature on that memo, in January 1986, was his first, last, and only contact with this case.

There are now two questions before this Court. The first is whether Justice Castille was required by force of the United States Constitution to recuse himself, three decades later, from the Pennsylvania Supreme Court's unanimous decision in the case. The second is whether the Constitution also mandates an automatic presumption that every other justice on the court was biased, so that all of their votes must be nullified as well.

Nevertheless, petitioner spends a considerable portion of his brief addressing a different claim, on which he chose not to seek review in this Court: the merits of the underlying *Brady*-mitigation issue adjudicated in the court below. He is supported in his effort by an amicus brief from the ACLU that is

completely devoted to this issue, and which says nothing at all about the due process recusal questions actually before the Court.

Presumably, petitioner seeks to suggest that the ruling below was erroneous, and the error is evidence of bias. But this approach is of dubious relevance to the issues on which the Court granted review.[1] In any case, there was no error.

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[1] In *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 895 (2009 (Roberts, C.J., dissenting), the dissenting justices raised exactly this question: "Does the due process [recusal] analysis consider the underlying merits of the suit? Does it matter whether the decision is clearly right (or wrong)?" The Court gave an implicit answer: it declined to discuss the merits of the underlying issue at all, even where it had resulted in an acrimonious, closely divided opinion in the court below. *See also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986) (declining to decide whether ruling below was consistent with existing law, "a judgment we are obviously not called on to make"); *Tumey v. State of Ohio*, 273 U.S. 510, 535 (1927) (rejecting argument that strength of evidence was relevant to due process analysis). Were it otherwise, every due process recusal claim would subside into a relitigation of the substantive issue below.

Statement of the case

1. Petitioner chose perjury over readily available mitigation evidence; there was no "suppression."

Petitioner's *Brady* claim is premised on his own admitted perjury. Among his numerous other violent crimes, petitioner robbed and killed two gay men. He testified under oath at the first trial that he did not have a sexual relationship with the victim and did not kill him. He testified at the trial in this case that he never even knew the victim until the day of the crime, and had nothing to do with his murder. He rejected his lawyer's advice to plead guilty in exchange for a life sentence, and was convicted and sentenced to death.

More than a decade later, on post-conviction review in this case, petitioner reversed course. His lawyers now acknowledged that he had perjured himself at the trial. They asserted that in fact he had repeatedly had sex with the victim for money, as had other teenagers, and that the victim was therefore a homosexual child abuser. They said petitioner intentionally killed the victim out of anger over this abuse.

Petitioner claimed that, if the jurors had heard this evidence, they would have given him the life sentence he refused before trial instead of the death sentence he received. He said it was his trial lawyer's fault that he did not use this revenge killing theory as a

mitigation strategy, and if it was not the trial lawyer's fault then it was the trial prosecutor's fault.

Twelve judges – including the original trial judge and a unanimous federal court of appeals – have considered and rejected petitioner's various forms of this mitigation claim. These judges held that the allegations about the victim would not have changed the sentence, in light of the evidence of petitioner's own egregious acts in this and other cases. Joint App. at 15a-37a; 250a-339a; 342a-377a. Petitioner relies on the now-vacated ruling of a thirteenth judge, who was newly assigned to the case after the original judge retired, and who disagreed with the judges who ruled before and after her.

As every other court concluded, however, the *Brady*-mitigation claim was without merit. Petitioner had ample opportunity to develop his "sexual abuse" mitigation claim before trial – he himself was allegedly one of the victims, and his family, friends and neighbors said they were aware of others. But petitioner did not *want* a life sentence; he wanted an acquittal. As he recognized at the time, evidence of his sexual activity with his two murder victims would have blown up his defense of innocence. He *objected* at trial to the sexual activity evidence that he now claims would have been mitigating. And it was petitioner's own false testimony that prevented the defense from presenting such evidence itself.

Trials, 1985-86

The pattern was set at petitioner's first homicide trial, for murdering Herbert Hamilton. The main witness for the prosecution was Mark Draper, petitioner's friend. Petitioner had told Draper that Hamilton gave him money and gifts in exchange for sex, that Hamilton was getting jealous, and that petitioner was going to "take care" of the problem. Shortly thereafter petitioner told Draper that he "took care" of Hamilton by luring him to bed, where he had hidden a knife. The victim was found naked, beaten, and stabbed to death, his valuables gone (N.T. 2/14/85, 36-39, 51-55; 2/15/85, 57-79; 2/19/85, 271-77; 2/20/85, 342-74; 2/3/86, 1835-41).

In his defense, petitioner did not claim that Hamilton had been sexually abusing him; on the contrary. He objected from the very first time the subject of his sexual contact with the victim was mentioned, in the Commonwealth's opening statement. Then he took the stand and denied from his own lips that he had any sexual relationship with the victim. He claimed that he barely knew Hamilton, that Hamilton had made an advance, that he defended himself in order to get away, but that someone else must have come along later and killed him (N.T 2/14/85, 23, 30-34; 2/20/85, 346-49, 480-584; 2/21/85, 595-97; 2/22/85, 724-25).

The second homicide trial, for murdering Amos Norwood, went much the same way. Draper was again the main witness. This time, there was no testimony about a sexual relationship between petitioner and the

victim, for the simple reason that, in contrast to Hamilton, petitioner never told Draper that he was having sex with Norwood. He did tell Draper, however, that the victim "liked boys," and that they could blackmail him to get money for gambling. He and Draper asked Norwood for a ride, made him drive to a nearby cemetery, beat him to death with a wrench and a tire iron, and stole his money and car (N.T. 1/14/86, 68-70; 1/22/86, 664-86; 1/23/86, 812-15).

In his defense, petitioner did not claim that Norwood had been sexually abusing him; on the contrary. He took the stand and denied from his own lips that he had ever even seen the man before the day of the murder. He claimed that he left before anything happened to the victim, and that other people must have killed him later. At the penalty phase, when his prior murder conviction was introduced, he objected to any reference to the underlying facts, making sure the jury would not hear the evidence of his sexual activity with the other victim (N.T. 1/27/86, 1175-1301; 2/3/86, 1811-18).

Under these circumstances, it was hardly surprising that the prosecutor would not have viewed additional sexual activity evidence as possible mitigation, let alone likely to change the sentence to life. Evidence that Norwood indeed "liked boys," and that petitioner was one of them, would have destroyed his defense at trial, and would have defeated his effort at the penalty hearing to prevent the jury from hearing the details of his prior murder.

Post-conviction petitions, 1996-2012

Had petitioner really wished to present such evidence, however, it is clear from his own pleadings that he could have done so. More than ten years after the Norwood trial, in 1996, petitioner filed a state post-conviction petition claiming that he had killed Norwood after all, but with mitigation. He contended that allegations about Norwood's conduct with petitioner and others were readily available before trial, and that his lawyer had violated basic standards of competency by not presenting them.

In support he offered testimony from James Villarreal, a lifelong mentor and self-described "father" to petitioner. Villarreal attested that he knew from several people in the community that Norwood had been molesting young boys for years. He said he would have been able and willing to testify to his knowledge at trial, had he been asked to do so (N.T 4/8/98, 226-37).

Petitioner also offered testimony from Donald Fisher, his lifelong friend. Fisher testified that Norwood "liked to have sex with kids," and that petitioner said he had traded sex with Norwood for money. He asserted that he would have presented this information at the time of trial, had he been asked to do so (N.T. 4/13/98, 593-618).

In 2012 petitioner expanded on the theme with a new post-conviction petition. This time he presented a statement from Rev. Charles Poindexter. Poindexter was a local clergyman known to petitioner

from pre-trial discovery materials, which revealed that police had questioned several neighbors about Norwood's homosexuality (N.T. 9/20/12 pm session, 97; Exhibit C-2).

Poindexter's statement asserted that he and a number of people in the church suspected Norwood of having inappropriate relationships with young men. He said that Norwood's wife would call him and ask him to help find her husband; she said he would disappear for several days at a time, and that young men would repeatedly come looking for him. Petitioner also produced a statement from Ronald House, a member of the church, who said Norwood propositioned him when he was a teenager (July 2012 Post-Conviction Petition, Appendix Tab 10, 11).

Again, petitioner maintained that all these allegations were readily available before trial, and that the lawyer's failure to present them to the jury constituted ineffective assistance of counsel. But doing so, of course, would have directly contradicted the allegations the client had chosen to present to the jury.

Last-minute hearing, September 2012

By September 2012, having completed state post-conviction and federal habeas corpus review, petitioner was finally facing a firm execution date. Two weeks before that date, the newly assigned judge, declaring that "death is different," announced that she would grant petitioner a hearing despite jurisdictional limitations on successive petitions (N.T. 9/14/12, 69).

She ordered the Commonwealth to produce the original trial prosecutor in court, but not to speak to her (N.T. 9/14/12, 72-87). She ordered the Commonwealth to retrieve all old police and prosecution files related to petitioner's crimes, but not to look at them (Motion to Complete Record, 10/26/12, ¶¶ 7-10). She took over questioning of the prosecutor from the defense, and confronted her with various documents the judge had personally culled from the 30-year-old files; she marked these as "court exhibits" (N.T. 9/20/12 pm session, 106-40; 9/25/12, 43-50, 162-64).

Just before her scheduled ruling, she ordered the defense to amend its petition for relief to reflect the grounds on which she intended to rule (Motion to Complete Record, ¶13). She then read a 40-page statement into the record, later followed by a 100-page written opinion. She said she had discovered three notes in the file that referred to Poindexter's suspicions about Norwood, to the allegation about Ronald House, and to Mrs. Norwood's reports about her husband's disappearances with young men. She accused the prosecutor of hiding this information from the defense, and held that it constituted the crucial evidence that would have mitigated the sentence. Joint Appendix F, G, O.

This was almost exactly the same information, however, that petitioner had already developed from Poindexter and his other post-conviction witnesses, and which he said was readily available to the defense at the time of trial.

While the judge spent over 26,000 words excoriating the prosecutor[2] for not relaying these allegations, there was one subject on which she had virtually nothing to say: petitioner's perjury. Not until a footnote almost 50 pages into her opinion did the judge even mention petitioner's actual testimony at trial. She noted that it was "inconsistent" with his sexual abuse victim claim, which she characterized as "an alternate defense theory." She suggested that petitioner – a double murderer who had sex with men for money – was just like the young boys who were raped by former Penn State coach Jerry Sandusky, but were afraid to tell. Joint App. at 111a.

The record does not support this rationalization. Petitioner *did* tell his lawyer about having sex with men; he just never happened to mention that any of the men included *his victim*. Nor was he shy about any other aspect of his defense. He told counsel what he wanted him to do throughout voir dire and trial, and he made repeated pro se requests. And when the trial was over, he secured a new lawyer for post-verdict motions, in order to litigate ineffective assistance of counsel claims. But he didn't tell *that* lawyer about alleged sex abuse either. The "alternate defense theory" didn't emerge for another decade (N.T. 1/6/86, 14-39; 1/14/86, 3-15, 75; 1/30/86, 1480-82;

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[2] The prosecutor worked in the district attorney's office from 1976 to 1990, when she left to become an assistant United States Attorney in the Eastern District of Pennsylvania. She is still there. In the almost 40 years she has served as an officer of the court, no other judge, state or federal, has ever found that she committed prosecutorial misconduct of any type in any case.

1/31/86, 1520; 2/3/86, 1614-15; 7/1/87, 60; 4/17/98, 774-75, 795).

The reality is that petitioner's perjury was not just another "alternate defense theory." The belated victimization claim was the antithesis of the words that came out of his own mouth at trial. His lawyer did not script that strategy Petitioner chose his own story and stuck to it throughout hundreds of pages of direct and cross-examination. There was no "suppression"; the jury heard what he wanted it to hear.

2. Petitioner's sentence was the product of his own conduct.

As the Third Circuit and Pennsylvania Supreme Courts concluded, petitioner's untimely "alternate theory" would not have changed the sentence in any case. It would only have opened the door to more evidence of his character.

A. His history of violent criminal acts.

Petitioner insists that his criminal behavior was just a reflex response to the sexual abuse he supposedly suffered. But the details of the crimes contradict that claim.

First burglary

Petitioner's first conviction was for a residential burglary. He broke into the home of a woman he apparently didn't know. There was no element of

abuse. Federal Habeas Response, 10/20/06, Ex. RR, p.18 (4/3/81).

Mr. & Mrs. Dorfman

The next year, petitioner was caught after breaking into another home, on Christmas Eve. He found an elderly couple asleep in their bed, where he held a rifle to the woman's throat and fired three bullets just above her head before escaping with their belongings. He did not know the couple. They had not been abusing him (N.T. 2/3/86, 1820-23, 1834-40).

Herbert Hamilton

A year later petitioner (while awaiting trial for the Dorfman case) committed his first murder. It was not on impulse; he hinted his plan to his friend days in advance, and carefully hid the murder weapon next to the bed where he had promised to have sex. There would have been no struggle but for the victim's unexpected resistance. Once he was safely dead, petitioner stole his credit cards. Petitioner later bragged to a friend about the killing, and showed off the scars he had received in the fight (N.T. 2/19/85, 271-76; 287-92; 2/20/85, 342-74, 404-05).

Robert Hill

Hill knew Hamilton and petitioner. Several months after Hamilton's murder, petitioner went to see Hill, and Hill let him into his home, not realizing petitioner had killed his friend. Petitioner pulled out a gun and threatened to kill Hill and his elderly

mother unless Hill gave up his money (N.T. 9/24/12 am session, 67-80; Exhibit C-6).

Amos Norwood

This was a crime of opportunity; petitioner and Draper were gambling on a street corner near Norwood's home and ran out of money. Petitioner came up with the idea of extorting Norwood, then directed Draper to help kill him so they could take everything he had. Petitioner drove Norwood's car to Atlantic City and used his credit cards to gamble and buy jewelry (N.T. 1/14/86, 68-70; 1/15/86, 370-90; 1/22/86, 664-91, 702; 1/31/86, 1556-62).

B. His history of fabrication.

Petitioner claims his credibility has been unfairly undermined by ineffective counsel and prosecutorial misconduct. A sampling of his elaborate history of deception suggests a different picture.

Scholar-athlete

Even while carrying out his crimes, petitioner managed to maintain a public persona as an academic and athletic success story. He was a star high school quarterback who won the city championship and a scholarship to college, where he made the varsity team. He killed Herbert Hamilton in the middle of freshman year, then went back to class. He took off a day for the Dorfman trial, then completed the spring semester and killed Amos Norwood just after the start of summer vacation. Even through his last trial,

petitioner kept convincing character witnesses that he was innocent, though the number willing to testify did diminish as his convictions mounted up (N.T 2/3/86, 1846-51; Joint App. 252a-254a, 327a-328a).

Mirror message

After Hamilton's life-and-death struggle ended, petitioner took the time to have a bath at the victim's house. Then he scrawled a message on the mirror, in toothpaste: "I loved you." He confided that his plan was to throw off police by implicating one of Hamilton's former lovers (N.T. 2/14/85, 39, 52; 2/20/85, 342-74).

Bloody palm print

Hamilton was beaten with a bat and stabbed with a knife. The murder remained unsolved for months. Petitioner was questioned, but absolutely denied any connection. Police eventually took petitioner's palm print, which turned out to be a perfect match to a latent print, left in blood, on the bat. Only at that point did petitioner's story change: this time he said he *had* been there, and touched the bat, but didn't inflict any of the fatal wounds (N.T. 2/7/85, 34-59; 2/8/85, 2-30; 2/15/85, 125, 166-80; 2/19/85, 319-32; 2/20/85, 416-26).

Calling Mrs. Norwood

The day after robbing and killing Amos Norwood, petitioner wanted to see if the body had been discovered. He decided to call the widow herself,

pretending to be an acquaintance of Amos. When he realized she did not yet know her husband was dead, he proceeded with a shopping and gambling spree using the victim's credit cards (N.T. 1/14/86, 73-84; 1/15/86, 372-84; 1/22/86, 691-96).

Letters to Draper

While in prison awaiting trial, petitioner wrote a series of letters to his co-defendant, Mark Draper, to coach Draper in various evolving lies to tell police. He instructed Draper, for example, to pin the Norwood murder on their friend Ronald Rucker; when he found out Rucker had a solid alibi, the next letter instructed Draper to name a different friend as the killer.

When the letters were discovered, petitioner swore they were written by someone else. When his own document examiner confirmed his handwriting, he claimed Draper had dictated the letters to him (N.T. 1/22/86, 617-26; 707-55; 1/23/86, 769-76, 842-47, 878-98; 1/27/86, 1227-34).

Ketchup-stained shoes

Shortly after Norwood's murder, petitioner admitted it to a friend, who noticed that petitioner was wearing blood-stained shoes. When the friend testified against him at trial, petitioner manufactured evidence, taking a similar pair of shoes and staining them with ketchup, in order to provide an innocent explanation for what his friend had seen. But the witness was able to remember that the shoes he saw were a different style, and the stains had a different

shape (N.T. 1/15/86, 363-66; 1/27/86, 1190-91, 1/30/86, 1376-82; 1/31/86, 1550-55, 1573-75).

Norwood's victim

Petitioner's lawyers have been claiming for years that he was the victim of horrible sexual abuse by Norwood and others. *Petitioner*, however, has never said a word about it. He has never testified to any abuse; he has never even signed a statement in his own name. Every single allegation has been submitted solely as hearsay, through the statements of third parties about what petitioner supposedly said to them.

It has been an ever-expanding story: from trial, where petitioner did not know Norwood at all, to the 1998 post-conviction petition, where petitioner was having sex with Norwood for money, to the 2012 post-conviction petition, where petitioner was raped by Norwood on the very night before the murder (July 2012 Post-Conviction Petition, Appendix Tab 12).

Petitioner has donned different identities over the years. As the courts below recognized, however, examination of the record did not support his claim for sentencing relief.

Summary of argument

No one is born a judge. They come to the bench after other careers, often as advocates in particular causes, cases, and controversies. Prior involvement in the subject of litigation may sometimes lead a judge to an individual decision to recuse. But no case of this Court has applied a constitutional *mandate* to disqualify a judge because of previous professional activities.

This is a poor case to begin what would be a dramatic expansion of the Court's narrow Due Process Clause recusal precedent. The experienced state supreme court justice below was an elected district attorney decades earlier. His only contact with this case in that capacity was the day in 1986 he signed off on a memo from subordinates recommending the death penalty. It was office policy that the district attorney put his signature on all such memos; he signed scores of them, along with all the other managerial tasks of running one of the nation's largest prosecution offices.

That single administrative act, if sufficient to invoke constitutional disqualification, would also require disqualification of many other judges and justices from precisely their areas of real-world expertise, and would leave courts short-staffed in many cases.

Other arguments for a new constitutional recusal rule are even weaker. The former district attorney's mere status as the person at "the helm" of the office,

29 years before the decision in this case, was not sufficient basis for mandatory disqualification. Nor was his statement years later, as a judicial candidate, when he referred to his office's past record in securing capital sentences in order to answer voters' questions about his views on the issue of capital punishment.

The case is poorer still for another reason. The decision below was not Justice Castille's; it was the decision of a unanimous court written by a different justice. There is no reason to believe all the other justices failed in their duty to decide the case fairly just because of Castille's presence.

In fact we know that is not true. Upon Justice Castille's retirement days after the decision below, when he could no longer have even arguable influence over his former colleagues, they considered petitioner's request for reargument of the original decision. They came to the same unanimous result. This is the same relief petitioner asks for now.

But there was no need for petitioner to wait until after Castille's retirement. If he really wanted the full court to rule on the recusal issue in advance, he could have asked the full court to do so, as his lawyers did in other cases involving Justice Castille. He never did here. He should not be heard to complain that they sat with Castille when he never asked them to review Castille's individual decision to sit.

What petitioner seeks is a conclusive presumption that the non-recusal of one justice "contaminates" every other justice on the court. That presumption is

an even more radical expansion of settled precedent and practice than his first argument. The Constitution demands a probability of actual bias in order to invalidate justices' votes on due process grounds. No presumption can properly substitute for proof of that probability. There is no evidence, let alone proof, that the other justices were biased.

Argument

I. The Constitution did not dictate disqualification of Supreme Court Justice Castille.

Recusal claims become due process claims only when "extreme facts [create] the probability of actual bias ris[ing] to an unconstitutional level." *Caperton v. A.T Massey Coal Co.*, 556 U.S. 868, 886-87 (2009). Petitioner's claim cannot meet that demanding test.

A. Justice Castille's brief administrative involvement, dating back to 1986, did not create a probability of actual bias 29 years later.

1. The memo.

Several decades ago, Ronald Castille served as the elected district attorney of Philadelphia. The district attorney's office employed more than 200 lawyers, over several levels of supervision, who prosecuted roughly 50,000 cases (including 300 homicide cases) each year.[3]

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[3] *See* CRAIG HEMMENS, ET AL., CRIMINAL COURTS: A CONTEMPORARY PERSPECTIVE, 140, 144 (2010) (Philadelphia District Attorney's Office organizational chart) ("the elected prosecutor rarely works on specific cases or makes court appearances. Rather, his or her duty is to delegate day-to-day responsibility for the prosecution of cases to supervisors and assistant prosecuting attorneys, to manage the organization and long-term planning for the office, and to set overarching policies and priorities").

In January 1986, a line prosecutor wrote a 1½-page memorandum to her supervisor. The memo recommended that, on the relevant facts and law, it was appropriate to pursue a sentence of death for petitioner's second brutal murder. Because the office sought the death penalty in a significant percentage of murder cases, this was one of many such memos; there were dozens a year.

Under office practice, the memos were passed up the chain of command for the district attorney's signature to indicate official concurrence. No memos were generated in cases where the trial prosecutor and supervisors did not recommend the death penalty. Castille signed the memo in this case and it was returned to the file.[4] That administrative act was the entire extent of his involvement.

Five years later, in 1991, Castille left the district attorney's office and entered private practice. Three years after that, in 1994, he became a justice of the Pennsylvania Supreme Court. Eighteen years after that, in 2012, petitioner filed his recusal motion, based on the 1986 memo.

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[4] The memo was typed on the city's pre-printed memorandum forms. At the bottom of the page, the form stated: "Response to this memorandum may be made hereon in longhand." [These words are not reproduced in the version of the memo printed in the Joint Appendix.]. Petitioner asserts that there is special significance in the fact that Castille "placed his own handwritten note" on the memo. Brief for Pet. at 5. But in pre-digital 1986, that was the standard method of response to any memo.

Now petitioner insists that this one memorandum from the 1980's would so dominate Justice Castille's thinking that, even three decades later, he could not reasonably be expected to perform his sworn duty as a jurist to review the new *Brady*-mitigation claim that petitioner presented below. Petitioner argues that we must engage in such a presumption because of the "solemnity" and "importance" of the decision to seek the death penalty. Brief for Pet. at 25.

But the question is not the importance of capital punishment as a matter of policy; the question is the likely impact of this one memo on the justice's deliberations almost 30 years later. Castille did not investigate this case; he did not try it; he did not directly oversee the lawyer who tried it. He did not "hide" any evidence; he did not know of any "hidden" evidence. Under these circumstances, there is no objective reason to believe Justice Castille would even have recalled this particular document 29 years later.[5]

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[5] *See, e.g., Commonwealth v. Abu-Jamal*, 720 A.2d 121, 123 (Pa. 1998) (Castille, J., denying recusal). Justice Castille issued many opinions, both published and unpublished, in support of rulings on recusal motions. Petitioner repeatedly asserts that in this case Castille "provided no explanation" for his recusal decision. Brief for Pet. at 27, 31. As the record shows, however, there would have been no time to draft an opinion under the circumstances here. Petitioner filed his recusal motion only in connection with the Commonwealth's emergency application to lift the stay of execution. His filing was made on October 1, 2012, two days before the scheduled execution date. Castille denied the recusal motion the same day, but joined the court in denying the application to lift the stay on October 3. *See Commonwealth v.*

But even after petitioner's recusal motion brought the memo to his attention, there was no probability of actual bias. Petitioner suggests that the memo provided Castille with special knowledge, unavailable to his colleagues on the court, because the memo made him "privy" to the details of petitioner's prior criminal record, including an armed robbery charge that was later withdrawn after the two murder convictions. Cert. Pet at 24. By the time of this appeal, however, all of petitioner's other crimes, including the robbery, had been made part of the official record before the Pennsylvania Supreme Court,[6] which included far more unfavorable information than anything in the memo.

Ironically, at the same time he says Castille knew too much, petitioner also says the justice knew too little, since the memo of course did not include all the allegations about supposedly mitigating evidence, made years later on collateral review. Cert. Pet. at 24. But that fact only further negates the probability of bias. Petitioner was not asking the Pennsylvania Supreme Court to decide whether Castille's 1986 death penalty authorization was reasonable when

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Williams, No. 163 EM 2012, docket sheet available at https://ujsportal.pacourts.us/DocketSheets/AppellateCourtReport.ashx?docketNumber=163+EM+2012. Once the stay was in place, with Justice Castille's concurrence, petitioner never renewed his recusal effort. *See* n.20, *infra*; Argument II.B., *infra*.

[6] *See* 2012 post-conviction hearing, N.T. [notes of testimony] 9/24/12 am session, at 67-80; Ex. C-6.

made; he was asking it to decide whether a line prosecutor had "suppressed" mitigation evidence that Castille knew nothing about. The whole point of this narrow claim was that the additional facts might have changed the mind of a judge or juror who was otherwise disposed toward a death sentence. After 20 years in his no-longer new role as a jurist, Justice Castille was competent to evaluate the legal standards applicable to such a claim.

Nor does the memo indicate that Justice Castille would harbor some special motive to protect any case in which he had formally approved the death penalty while DA. On the contrary: his judicial record shows that he voted to reverse in numerous capital murders that occurred on his watch as DA. *See, e.g.*, *Commonwealth v. Mikell*, 729 A.2d 566 (Pa. 1999) (granting new trial); *Commonwealth v. Rush*, 838 A.2d 651 (Pa. 2003) (reversing and remanding); *Commonwealth v. Rainey*, 928 A.2d 215 (Pa. 2007) (reversing and remanding); *Commonwealth v. Bracey*, 986 A.2d 128 (Pa. 2009) (remanding for *Atkins* hearing in murder of police officer).[7] Petitioner's presumption

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[7] In most of these cases, the vote to remand for further proceedings ultimately resulted in reduction of the death sentence to life. Over the length of Castille's judicial tenure, there were 34 Philadelphia capital cases in which the defendant received relief from the court. Castille voted for the defense in 21. *See Commonwealth v. Keaton*, 45 A.3d 1050 (Pa. 2012); *Bracey*, 986 A.2d 128; *Commonwealth v. Hackett*, 956 A.2d 978 (Pa. 2008); *Commonwealth v. Gibson*, 951 A.2d 1110 (Pa. 2008); *Commonwealth v. Dennis*, 950 A.2d 945 (Pa. 2008); *Commonwealth v. Cooper*, 941 A.2d 655 (Pa. 2007); *Rainey*, 928 A.2d 215; *Commonwealth v. Carson*, 913 A.2d 220 (Pa. 2006);

of bias is at odds with these actual outcomes.

Indeed, even *in this very appeal* Justice Castille cast his original vote in favor of the defense, refusing to lift the stay of execution. While he later voted to reject petitioner's merits claim, it was the initial ruling that has proved the most important. By denying the Commonwealth's motion to vacate the stay, the court allowed the warrant of execution to expire. Now, three years later, the execution remains indefinitely suspended under the governor's indefinite reprieve, regardless of the result of the present proceedings.[8]

If bias is ever to be presumed under these circumstances, it must at least have a half-life. Remarkably, though, petitioner never even mentions the passage of time in this case – as if the memo had just been signed yesterday, as if Justice Castille had filled his mind with nothing else over the decades that

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Commonwealth v. Sneed, 899 A.2d 1067 (Pa. 2006); *Commonwealth v. Hughes*, 865 A.2d 761 (Pa. 2004); *Commonwealth v. Gribble*, 863 A.2d. 455 (Pa. 2004); *Commonwealth v. Smith*, 861 A.2d 892 (Pa. 2004); *Commonwealth v. DeJesus*, 860 A.2d 102 (Pa. 2004); *Commonwealth v. Brooks*, 839 A.2d 245 (Pa. 2003); *Commonwealth v. McGill*, 832 A.2d 1014 (Pa. 2003); *Commonwealth v. Harvey*, 812 A.2d 1190 (Pa. 2002); *Commonwealth v. Rizzuto*, 777 A.2d 1069 (Pa. 2001); *Commonwealth v. Nieves*, 746 A.2d 1102 (Pa. 2000); *Commonwealth v. O'Donnell*, 740 A.2d 198 (Pa. 1999); *Mikell*, 729 A.2d 566; *Commonwealth v. Brown*, 711 A.2d 444 (Pa. 1998); *Commonwealth v. LaCava*, 666 A.2d 221 (Pa. 1995).

[8] *See* Argument II.A., *infra*.

have actually elapsed.

Instead, petitioner relies primarily on *In re Murchison*, 349 U.S. 133 (1955), contending that the memo makes this case a match to that one. And yet *Murchison* is almost an exact antithesis. There the judge was literally designated as "a one-man grand jury"; he was the one witness to the alleged perjury before him, and its one victim; and the entire course of events occurred ***within a single week*** – from testimony, to show-cause order, to conviction and sentence. *In re White*, 65 N.W.2d 296, 297-98 (Mich. 1954) (opinion below).

Justice Castille's 1986 approval signature does not compare. It was one of hundreds of documents he signed more than a quarter century before. Its content, even if he could have remembered it, did not indicate prejudgment of the new mitigation claim that later came before his court. What it did show was that as district attorney Castille supported capital punishment, and that his signature was an expression of that general policy. As discussed below, that is not constitutional grounds for disqualification.

2. The helm.

Petitioner also argues that the Constitution mandated recusal because Justice Castille "was at the office's helm" during the course of the prosecution. Accordingly, the trial prosecutor was one of his 200+ subordinates, and he was therefore, says petitioner, responsible for her purported misconduct simply by virtue of his position. Brief for Pet. at 28-29.

Under petitioner's "helm" theory, of course, this would have been far from the only case in which recusal would have been required. A likelihood of bias would have to be presumed in an appeal from virtually any of the quarter million prosecutions arising during Castille's time as DA, as long as the defendant was careful to include a *Brady* claim or any other allegation he could characterize as "prosecutorial misconduct."

But such a presumption against Castille as justice could not hold up even at the beginning of his judicial career, let alone at the very end. In September 1995, a year and a half after he took the bench, the court heard the case of a Philadelphia cop killer who had been sentenced to death. The murder was committed and the crimes were charged while Castille was "at the helm"; the case was tried by one of his longtime subordinates a few months after he left office. Justice Castille voted to vacate the death penalty on grounds of prosecutorial misconduct; in fact he authored the opinion of the court. *Commonwealth v. LaCava,* 666 A.2d 221 (Pa. 1995).

What the "helm" theory may lack in predictive power, however, it makes up in overreach. Petitioner's approach would require any judge, who at any previous point in his or her career was ever at the head of any organization – a law firm, a state or federal office, a non-profit – to recuse, for life, from any case involving the alleged action of a prior employee. Simply by virtue of his former post, the judge would bear "his own responsibility," and could not rule

against the employee without "admitting misconduct" under his auspices. *See* Brief for Pet. at 28-29.

But petitioner himself appears to recognize that *respondeat superior* will not work as a constitutional recusal rule. He allows that no presumption of bias would apply to a former Attorney General of the United States, because the Justice Department is "the largest law office in the world," with thousands of lawyers and hundreds of thousands of cases. "The relationship of the Attorney General to most of those matters is purely formal." Cert. Reply Brief at 4, quoting *Laird v. Tatum*, 409 U.S. 824, 829 (1972).

This acknowledgement belies petitioner's premise. Even in organizations far smaller than the United States Department of Justice, it is impossible for the chief officer to engage fully with every action performed in his or her name. When Castille was District Attorney, he headed one of the biggest law offices in the state, and one of the biggest prosecutor's offices in the country. His relationship to almost every case was purely formal. [9] Of course in this case there

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[9] Petitioner makes the point himself, albeit indirectly. He claims that Castille appeared as "counsel" for the appellee during petitioner's direct appeal, simply because Castille's name was included at the bottom of a list on the front of the Commonwealth's brief. Brief for Pet. at 7. As the official appeal docket shows, however, there was never any entry of appearance for Castille, and he was not listed as counsel in the case. Resp. Brief App. 2; *see* Pa. R. App. P 120. His name is on the brief as a matter of formality, just as the District Attorney's name appears on the front of every brief (1000-2000 a year) filed by the District Attorney's Office. The name does not indicate that the

was one thing more: the memo. But that was the beginning and the end of his involvement. His status as District Attorney adds nothing else to the recusal equation.

And just as size matters, so does time. Petitioner speaks as if Justice Castille were *currently* the District Attorney, as if he hadn't changed branches more than twenty years ago. Petitioner repeatedly refers to this Court's due process disqualification cases for the proposition that a judge cannot occupy "dual roles." Brief for Pet. at 24, 27-28. Yet in every one of these cases, the judge had two (or more) roles *at the same time.* [10] In this case, it has been a quarter century since Castille resigned as DA. His only obligation here was to his judicial oath.

Because no constitutional ruling of this Court applies, petitioner instead relies on a non-constitutional circuit court ruling. Citing *In re Bulger*,

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District Attorney has any personal involvement in the filing, or even personal knowledge of it.

[10] *See Murchison*, 349 U.S. at 134-35 (simultaneously witness, accuser, prosecutor, and judge of perjury); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971) (simultaneously victim and adjudicator of contempt); *Tumey v. Ohio*, 273 U.S. 510 (1927) (simultaneously adjudicator of liquor fines and recipient of fines as personal salary); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (simultaneously adjudicator of traffic fines and mayor whose budget depended on those fines); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) (simultaneously adjudicator of legal issue binding in judge's own pending lawsuit as civil plaintiff); *see also Caperton*, 566 U.S. at 886 ("temporal relationship" is "critical").

710 F.3d 42 (1st Cir. 2013), he suggests that the "institutional ties" of a former "supervisory" prosecutor are sufficient to require recusal. Brief for Pet. at 29. But he neglects the dispositive facts. The judge in *Bulger* had, as an Assistant United States Attorney, responsibility over matters that later became the subject of a major federal scandal and a formal Congressional inquiry and report. A former colleague had already testified, and the judge was likely to be called as a witness himself about his personal knowledge of an alleged immunity deal with organized crime figures who had bribed FBI agents and used government information to target their rivals for assassination.

Here, in contrast, petitioner charges that an assistant, five levels below the District Attorney, committed a *Brady*-mitigation violation – but makes no claim that Castille ordered it, was a witness to it, or ever even knew about it. Petitioner urges, in effect, that due process required Castille's disqualification simply because his name was on the door. Nothing in the Constitution or this Court's precedent supports that.

3. The "tout."

Petitioner insists that Justice Castille had to recuse himself because, during his judicial campaign over 30 years ago, he "touted" and "bragged" about his pursuit of capital prosecutions as District Attorney. Petitioner lifts these and similar characterizations from some 1993 newspaper stories, and even an op-ed. Brief for Pet. at 8-9. It should go without saying that

the curated conclusions of selected media members cannot create a recusal due process violation.

In the body of his argument, petitioner does rely on a passage actually quoted from candidate Castille; but even here petitioner cuts out key words and context. Brief for Pet. at 30-31. The quote is taken from a 1993, 5,000-word article in *The Legal Intelligencer*, the daily newspaper covering the legal profession in Philadelphia. The article reported an interview with all three of the candidates running for a seat on the Pennsylvania Supreme Court, covering a number of judicial issues.[11]

One section of the interview addressed state ethical provisions prohibiting judicial candidates from stating their views on pressing social questions such as "gun control, abortion, the death penalty or any hot issue of the day." Resp. Brief App. 11. One of the candidates said he would be in favor of "relaxing the rules about discussing issues." *Id.* Another candidate pointed out that he had gone so far as to challenge the constitutionality of the rules in federal court. *Id.* Castille, the third candidate, responded, "you ask people to vote for you, they want to know where you stand on the death penalty. I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get the hint." *Id.*

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[11] Lisa Brennan, *State Voters Must Choose Next Supreme Court Member: Three Candidates Answer Tough Questions on the Law, the Court and Justice in Pa.*, LEGAL INTELLIGENCER, October 28, 1993. The article, not available online, is reproduced in full at Resp. Brief App. 4-28.

Petitioner admits, as he must, that Castille had the right to say where he stood on the death penalty, Brief for Pet. at 31. *See Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). Yet he then criticizes Castille for doing exactly that. He says Castille's comment meant he was really hinting "about how he would rule" on specific appeals. Brief for Pet. at 24. He claims Castille's reference to 45 capital cases meant he was "emphasiz[ing] his personal decisions to seek the death penalty." Brief for Pet. at 31.

This is simply spin. Castille did not refer to the facts of any individual case; he did not mention the name of any individual defendant (let alone petitioner's); he did not state how he would vote on any individual issue in any capital appeal. He explained exactly what he was "hinting" about: his personal position on capital punishment. He made clear exactly why he was "hinting": because of restrictive state rules that even the other candidates opposed, and that eventually this Court struck down. He announced exactly why he was referring to his office's capital prosecutions: because citizens "want to know where you stand on the death penalty."

Petitioner's real complaint, therefore, is not that Castille took a stand on the death penalty; it is that the stand was pro rather than con. Because surely there would be no constitutional recusal issue in the other direction. If an *anti*-death penalty prosecutor, from an anti-death penalty jurisdiction, said that he had *never* sought the death penalty, even after 45 potential capital cases, people would get the "hint."

Indeed there would be no need to hint. If a judicial candidate or nominee – or even a sitting judge – announced openly that he or she thought the death penalty unwise or likely even unconstitutional, there is no court in the land that would impose a due process requirement of mandatory disqualification from all future capital cases.

The reality is that all judges come to the bench with opinions that might conceivably affect their analysis of future cases. *See Republican Party of Minnesota*, 536 U.S. at 777-78; *Laird*, 409 U.S. at 838-39.[12] Petitioner deprecates Castille as the "law-and-order," "get-tough-on-crime" candidate when he ran for office 23 years ago. Brief for Pet. at 8, 30. When an attorney becomes a judge, however, he assumes special duties. He or she is expected to adopt a new perspective. Petitioner presents no support for the proposition that former prosecutors – unlike all other new jurists – are constitutionally incapable of making that transition.[13]

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[12] Petitioner suggests that, while a judicial hopeful can express his views on the law when running as a candidate, due process will then require him to recuse if he is elected as a judge. In support he cites Justice Kennedy's concurring opinion in *Republican Party*. Brief for Pet. at 31. But he paraphrases rather than quotes the relevant passage, thereby reversing its import here. *See Republican Party*, 536 U.S. at 794 (Kennedy, J., concurring) (a state may not censor judicial candidates, but "[i]t may adopt recusal standards *more rigorous than due process requires*") (emphasis supplied).

[13] And there is certainly evidence to the contrary, as a prominent example suggests. In a campaign article that

Nor, contrary to petitioner, Cert. Pet. at 19, does this case provide any basis for adopting a special constitutional recusal rule for judges chosen by election as opposed to appointment. To be sure, elections potentially raise financial interest questions, as *Caperton* recognized. But there are no financial

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petitioner does not cite, candidate Castille proposed a series of reforms of the capital litigation process: streamlined appeals, filing deadlines, successive petition limits. *Supreme Court Candidates Agree on One Thing: Change*, ALLENTOWN MORNING CALL, Oct. 18, 1993, at A8. After Castille's election, the Philadelphia District Attorney's Office set to work drafting a proposed package of major reforms to the state statute governing the capital review process. Eventually, the state legislature passed an extensive new statutory scheme setting up a system of unitary review like that in some other states.

On enactment, the Defender Association of Philadelphia, petitioner's counsel, took the unusual step of filing a petition for extraordinary jurisdiction, challenging the legality of the new statute. Both the district attorney's office and the state attorney general defended the law. But the Pennsylvania Supreme Court struck it down – on the ground that it unconstitutionally encroached on the court's exclusive powers. *In re Suspension of the Capital Unitary Review Act*, 722 A.2d 676 (Pa. 1999). It was Justice Castille who wrote the opinion of the court.

And Justice Castille has hardly been the only former advocate to assume new duties as a jurist. His immediate predecessor as chief justice was the former Chief Public Defender of Pittsburgh. Sadie Gurman, *Obituary: Ralph J. Cappy, Retired Pennsylvania Chief Justice*, Pittsburgh Post-Gazzette, May 3, 2009.

issues here,[14] and any other concerns are not categorically different in an election process than in an appointment process. In both contexts, those who choose "want to know where you stand." The inclination to accommodate that desire may be even more concentrated under an appointive system, where there are relatively few decision-makers, with considerable power over the final outcome. *See Republican Party of Minnesota*, 536 U.S. at 781 n.8.[15]

Yet statements of ideology by prospective judges have not previously been considered disqualifying. If "judicial philosophy" were now to provide grounds for recusal motions under the Due Process Clause, then all judges would be subject to them, regardless of their method of selection.

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[14] Castille's main opponent in the 1993 election amassed four times as much money as the other candidates combined, and set a new state record for judicial election campaign spending. Tim Reeves, *Castille Leads GOP Sweep of Courts*, PITTSBURGH POST-GAZZETTE, Nov. 3, 1993, page A1.

[15] Notably, the question of judicial selection was one of the issues of the day addressed in *The Legal Intelligencer* article quoted above. Both Castille and his main opponent expressed support for an appointment process. But the third candidate, although a political outsider and reform proponent, stated that he could not support "merit" selection of the Pennsylvania judiciary. He explained his position with a reference to Vincent Fumo, at the time a state senator and powerful political broker in Pennsylvania (later convicted and sentenced to prison on various mail and wire fraud charges). Fumo, it was reported, was all in favor of appointing rather than electing judges –"because he can then do in 15 minutes what it used to take him six months to do." Resp. Brief App. 10.

B. Petitioner himself did not consider Castille's prior role as grounds for disqualification in his three previous appeals.

The case before this Court arises from a collateral appeal decided by the Pennsylvania Supreme Court in 2014. But that was hardly the first time petitioner's sentence came before Justice Castille as a member of that court. In fact, petitioner filed three prior collateral appeals: in 1998, in 2005, and 2008. All of these appeals were filed after the justice's allegedly disqualifying conduct, all of which occurred before he took the bench in 1994; nothing relevant changed between the first three appeals and the last, except that the purported basis for bias had become ever more remote over the decades that have passed since January 1986.

Yet, as shown by the computerized court dockets,[16] petitioner never raised any objection to Justice Castille's participation in those adjudications of the very same judgment of sentence that he challenges here. His own assessment of no probable bias in the first three appeals counsels the same conclusion in the fourth.

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[16] Pennsylvania Supreme Court dockets from the late 1990's are available online at: https://ujsportal.pacourts.us/DocketSheets/Appellate.aspx

The 1998 appeal is at docket number 247 CAP; the 2005 appeal is at 476 CAP; the 2008 appeal is at 560 CAP.

Petitioner implies that he could not have claimed bias earlier because he only recently discovered Castille's personal role in the recusal process. He says that the first challenge to Justice Castille, on grounds that he personally approved death penalty prosecutions as district attorney, did not occur until the case of *Commonwealth v. Rainey* in 2005. Brief for Pet. at 10.

That is not accurate. Castille's role in the death penalty approval process was known publicly from at least the earliest days of his judicial tenure. And petitioner's counsel began filing recusal motions on that basis as early as 1998, before any of his collateral appeals in this case.

Media coverage of the recusal issue began from the first moments Castille ascended to the supreme court, three years after he left the district attorney's office. In January 1994, *The Philadelphia Inquirer* reported on a recusal motion filed by a member of the Defender Association of Philadelphia, petitioner's counsel here, who later appeared on the docket as counsel of record in petitioner's previous state supreme court appeals.[17]

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[17] Emilie Lounsberry & Henry Goldman, *Castille Says He Won't Step Aside*, PHILADELPHIA INQUIRER, Jan. 25, 1994, at B1. *See* petitioner's appeal dockets at 476 CAP and 560 CAP (identifying Helen Marino, Defender Association of Philadelphia, 601 Walnut Street, Philadelphia, PA, as counsel of record).

In this Court, petitioner's counsel identify themselves as the Federal Community Defender Office. That entity is a component of the Defender Association of Philadelphia, which is the name by which counsel identified themselves in petitioner's state court

The *Inquirer* article contained a quote from a lawyer who had been chief of the homicide unit under Castille – and whose name appears on the death approval memo in this case. Joint App. at 424a. "In capital cases," said the former homicide chief, "[Castille] had a limited role, *approving to seek the death penalty*. There is involvement in these death penalty cases, but I don't know whether it would be enough to force his recusal."

Thus, petitioner's counsel would have been well aware of the recusal issue all along. And by 1998 – not 2005, as petitioner states – petitioner's counsel began filing recusal motions in the Pennsylvania Supreme Court based precisely on Castille's "personal" role in the death penalty approval process. *See, e.g.*, Appellant's Motion for Recusal of Justice Castille, *Commonwealth v. Rollins*, No. 192 CAP (Pa.) (alleging that Castille "was personally involved ... in specifically authorizing the Commonwealth to seek the death penalty against Appellant"). Resp. Brief

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appeals. A unit within the office (the "Capital Habeas Unit") receives federal funding from the Administrative Office of United States Courts, with which it represents most Pennsylvania capital defendants on collateral review, not only in federal court but in state court as well. *See* Petition for Writ of Certiorari, *Pennsylvania v. Federal Community Defender Office*, *cert. pending* at No. 15-491. This entity has represented petitioner since his first collateral petition.

App. 34.[18] The Rollins motion discussed much of the same due process recusal precedent on which petitioner relies today. The only difference is that now we are four steps further removed from the conviction under review, because on his first three collateral appeals petitioner discerned no unfairness in Justice Castille's participation.

Troublingly, while the recusal issue did not change over the course of petitioner's appeals, his procedural posture did. In the first three appeals, he was the appellant. In the fourth, he was the prevailing party below. That fact magnified the effect of any recusal he could secure, because a judgment will be affirmed by an equally divided court, or by a court that lacks a quorum.

As Justice Breyer has observed, "if I take myself out of a case in the Supreme Court[,] that could change the result because there is no one else to put in. And the parties knowing that—and I'm not saying they would, but it's possible—[could] try to choose your panel which is undesirable in the Supreme Court."[19]

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[18] *See* Rollins appeal docket at 192 CAP, identifying Robert Brett Dunham, Defender Association of Philadelphia, as co-counsel of record.

[19] *Considering the Role of Judges under the Constitution of the United States:* Hearing before S. Comm. on the Judiciary, 112th Cong. 27-28 (2011) (statement of Justice Stephen Breyer). *Accord, An Open Discussion with Ruth Bader Ginsburg*, 36 CONN L. REV. 1033, 1038 (2004) ("risk that one party or another" would take actions "aiming to take us out of the case").

Tactical recusal practice would, indeed, be undesirable. To reduce the danger, it is essential to consider the parties' own treatment of the issue over the course of the litigation. *See, e.g., Uttecht v. Brown*, 551 U.S. 1, 18 (2007) (failure to object to putative error, particularly where counsel has contemporaneously objected to other instances of similar error, is evidence that objection would have been without merit); *Darden v. Wainwright*, 477 U.S. 168, 178 (1986) (that "[n]o specific objection was made" suggests that subsequent claim lacked merit). As evidenced by petitioner's own behavior, recusal was not required in 2014 any more than it had been in 1998, 2005, or 2008.

See also Michael Matza, *Heidnik Defense: Disqualify Castille*, PHILADELPHIA INQUIRER, April 24, 1997, at B1. This is another case in which a Pennsylvania capital defendant chose not to seek Justice Castille's recusal – at least not at first. Castille granted a temporary stay to allow for a last-minute competency hearing, but voted against extending the stay when the hearing was done. Only then did the defendant (represented by petitioner's counsel in this case) file a recusal motion.

Notably, Justice Castille *granted* that motion and did not participate in further proceedings involving Heidnik. *See In re Heidnik*, 720 A.2d 1016 (Pa. 1998); *Commonwealth v. White*, 734 A.2d 374 (Pa. 1999). The Heidnik case had commanded widespread public concern during Castille's term as district attorney. Unlike this case, Castille did have personal involvement, beyond affixing his signature to a death penalty approval memorandum. Castille also recused himself in other cases where he had significant personal involvement as an assistant district attorney. *See, e.g., Commonwealth v. Lark*, 698 A.2d 43 (Pa. 1997); *Commonwealth v. Basemore*, 744 A.2d 717 (Pa. 2000).

C. Petitioner's "prior involvement" rule conflicts with constitutional precedent and this Court's own practice.

Petitioner contends that the Due Process Clause disqualifies a judge from a case in which he had prior involvement, because he therefore may be predisposed in favor of one party over another. Recusal may sometimes be advisable in such cases as a matter of ethics, or even required as a matter of statute. But it has never been mandated by the Constitution. Nor have prominent past Justices of this Court applied such a principle in their own actions.

As the Court has made clear, the Due Process Clause at ratification incorporated the common law: recusal was required if the judge had a financial interest in the case, but not because of an alleged pre-existing bias. *Caperton*, 556 U.S. at 876-77; *see* John P Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947) (rule "was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else").[20]

In the modern era, the Court has recognized two categories in which due process may require recusal:

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[20] "The law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986) (quoting 3 W Blackstone, Commentaries at 361).

cases involving a broader notion of financial interest, and cases in which the judge simultaneously acted in two conflicting roles, such as victim of contempt and its adjudicator. *Caperton*, 566 U.S. at 877-81.[21]

Petitioner compares his claim to the second category, on the ground that even a prior, non-contemporaneous involvement makes a "man ... a judge of his own case." Brief for Pet. at 35. He cites a bevy of non-binding authorities applying this principle to judges who at one time were prosecutors. Brief for Pet. at 32-35. But little of it is constitutionally based. And none explains why the prior involvement rule would apply only to former prosecutors, but not to other more direct forms of involvement.

Yet, as a survey of the Court's own history shows, prior justices have elected to participate in cases in which they had far greater – and far fresher – involvement than that claimed here. These are several examples.

- Chief Justice Marshall

  Marshall was the Secretary of State in 1802 whose efforts to seat a federal officeholder were thwarted by his successor and political opponent, James Madison. Marshall wrote the opinion of the Court in the case challenging Madison's conduct, *Marbury v. Madison*, 1 Cranch (5 U.S.) 137

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[21] *See* note 9, *supra* note 10.

(1803).[22]

- Justice Chase

  As Secretary of Treasury during the Civil War, Chase was responsible for the passage of the Legal Tender Act establishing a national paper currency, and he had an engraving of his face placed on the first bills. After Lincoln appointed him as Chief Justice, he participated in the first case addressing the constitutionality of the Act, *Hepburn v. Griswold*, 8 Wall (79 U.S.) 457 (1871).

- Justice Black

  As a United States senator, Black spent several years shepherding the Fair Labor Standards Act to passage, and the bill at one point carried his name. After leaving the Senate in 1937 for the Court, Black participated in the first case addressing the constitutionality of the Act, *United States v. Darby*, 312 U.S. 100 (1941).

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[22] *See* James Sample, *Supreme Court Recusal from Marbury to the Modern Day*, 26 GEO. J. LEGAL ETHICS 95, 105-07 (Winter 2013).

Petitioner suggests that there is no record of a recusal petition filed in that case, thus excusing Marshall's participation. Cert. Reply at 4 n.3. But if petitioner's prior involvement rule is of constitutional dimension, then it would subsume any ethical rules of similar substance, and would therefore be self-executing. A judge with prior involvement in the case would be required to recuse himself, even if no one asked.

- Justice Frankfurter

  As a leading law professor, Frankfurter was a prime drafter of the Norris-LaGuardia Act (1932). After appointment as a Justice, he authored the opinion of the Court broadly interpreting the statute in *United States v. Hutcheson*, 312 U.S. 219 (1941) (the "Act removed the fetters upon trade union activities").[23]

- Justice Jackson

  As Attorney General in 1941, Jackson authorized the wartime presidential seizure of a striking factory. When the next president ordered another seizure, the first seizure was the main precedent argued to the Court. Jackson thought about recusing, but decided against it. He wrote an opinion justifying the first seizure and condemning the second. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J., concurring).[24]

- Justice Marshall

  Marshall was chief legal counsel of the NAACP and founded and headed the Legal Defense Fund for

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[23] *See Laird v. Tatum*, 409 U.S. at 831-32.

[24] *See* Adam J. White, *Justice Jackson's Draft Opinions in the Steel Seizure Cases*, 69 ALB. L. REV. 1107 (2006).

over 20 years, until taking the bench. He had a general policy to recuse in NAACP cases, but sometimes did not. *See, e.g.*, *Milliken v. Bradley*, 418 U.S. 717 (1974).[25]

None of these is a case in which the justice's prior participation was in any sense neutral. The justices-to-be had central, partisan, and intense involvement in the precise subject matter of the controversies they later adjudicated.

Petitioner says that is unconstitutional. He maintains that a judge's "interests and reputation" are "plainly implicated" by prior involvement in the subject of the litigation. Brief for Pet. at 28. That is a truism. It is only human nature to tend toward a prior position, and away from a challenge to it. This may especially be so, as in some of the cases above, where the prior involvement constitutes a significant part of a judge's life's work. In each of these instances, an objective observer might have seen factors that could "tempt adjudicators to disregard neutrality." *Caperton*, 556 U.S. at 878. Certainly the litigants would.[26]

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[25] *See* Ross E. Davies, *The Reluctant Recusants: Two Parables of Supreme Judicial Disqualification*, 10 GREEN BAG, 2d Series 79 (2006).

[26] "I do not doubt that a litigant in the position of respondents would much prefer to argue his case before a Court none of whose members had expressed the views that I expressed about the" issue in question. *Laird*, 409 U.S. at 833.

But that is the difficulty with the constitutional extension petitioner proposes. Some of the justices above voted exactly as might have been expected from their prior, partisan involvements. Others did just the opposite. But all of them acted in a completely new capacity. Their "interests" had changed.[27] A mandatory recusal rule, based on activities long before a judge assumed the bench, does not accommodate that new vantage.

Nor does petitioner confront other effects of his effort to generalize existing precedent – from cases of financial interest and simultaneous, conflicting roles, to all cases of "significant" past involvement.

As members of the Court have recognized, a justice's "duty to sit" is particularly strong "because if we recuse without absolutely finding it necessary to do so," there is no replacement.[28] That is the case not

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[27] *See, e.g., License Cases*, 5 How. 504, 575 (1847) (opinion of Taney, C.J.) ("I argued the case [as counsel] in behalf of the State, ... and certainly I at that time persuaded myself that I was right, and endeavoured to maintain that the law of Maryland ... was valid and constitutional.... But further and more mature reflection has convinced me" otherwise).

See also Sample, 26 GEO. J. LEGAL ETHICS at 128 (citing view of legal ethics expert that prior role in subject of litigation as advocate, years earlier, would no longer provide any reasonable basis to question justice's impartiality).

[28] Supreme Court Fiscal Year 2014 Budget (C-SPAN2 television broadcast Mar. 14, 2013), *available at* http://www.c-span.org/video/?311494-1/supreme-court-fiscal-year-2014-budget (Justice Kennedy addresses recusal standards at 1:20:48-

only on this Court. While many states choose to provide for replacement of recused justices of the court of last resort, several others – including Pennsylvania – do not.[29]

Statutes and codes of conduct can account for this difficulty by building in room for the exercise of discretion. But when recusal is constitutionalized, it becomes mandatory, and uniform. There will be many more empty seats on the bench under petitioner's approach. And there will be many experienced judges who will be excluded from exactly their areas of expertise.

Petitioner seeks to alter the constitutional test in another way as well; he asserts that recusal is required if prior involvement may cause even an *appearance* of bias. He makes this point over and over through his brief, *e.g.*, at 20, 21, 24, 29, 31, 34, 39, 40. In effect, he is insisting that Justice Castille must be disqualified under the Due Process Clause because his prior involvement "looked bad." *See Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1371-72 (7th

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1:21:11); *accord, Ginsburg discussion*, 36 CONN. L. REV. at 1039 (2004); *Laird*, 409 U.S. at 837.

[29] *See Commonwealth v. Wetton*, 648 A.2d 524, 528 (Pa. 1994) (replacement only in cases of "indefinite unavailability of a member of the Court"); *see, e.g.*, Ky. Const. § 110 (replacement only if two or more justices unable to sit); Mich. R.C. 2.003(D)(4)(b) (replacement after recusal except for supreme court); Va. Const. Art. VI, § 4 (replacement for any "court of record except the Supreme Court"); Wis. Const. Art. VII, § 4(3) (same).

Cir. 1994).

But this is simply not the law. This Court was clear in *Caperton* about the high threshold it imposed: an "intolerable probability of actual bias." 556 U.S. at 882. The Court explicitly contrasted this rule with non-constitutional judicial conduct codes that address the appearance of impropriety. "States may choose to adopt [such] standards," but they are "more rigorous than due process requires." *Id.* at 888-89. In direct denial of *Caperton*, petitioner seeks to raise the "constitutional floor" up to "the ceiling set by common law. statute, or the professional standards of the bench and bar." *Id.* at 890.

Perhaps in the future the Court will be presented with "an extraordinary situation where the Constitution requires recusal," *id.* at 887, on the basis of a judge's extensive prior involvement in the subject of the litigation before he or she ascended to the bench. But this is not the appropriate case in which to extend current law

II. The Constitution did not invalidate the votes of every other justice on the Supreme Court.

A. Petitioner has already received the relief he now requests.

In his certiorari papers, petitioner never specified the form of relief to which he would be entitled if his arguments prevailed. Having secured review, petitioner now says that what he seeks is the

reconsideration of his *Brady* claim by the remaining justices, without the participation of Justice Castille. Brief for Pet. at 19, 38, 51. He fails to note that he has already gotten that.

This case was decided by the Pennsylvania Supreme Court on December 15, 2014 – just two weeks before Justice Castille's scheduled retirement on December 31. In fact, Castille's retirement date was fixed by the state constitution, and had been known for over a decade: the last day of the calendar year in which he reached age 70. Pa. Const. Art. 5, § 16(b).

On December 29 – on the eve of Justice Castille's retirement – petitioner filed a timely application for reargument. Joint App. 9a. Having the benefit of the court's reasoning from its December 15 opinion, petitioner was able to explain all the ways in which he believed the court erred in denying his *Brady* claim.[30]

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[30] Petitioner's counsel were well-versed in the reargument procedure. *See, e.g., Kindler v. Horn*, 542 F.3d 70, 77 (3rd Cir. 2008) (defendant represented by petitioner's counsel) (rejecting Commonwealth's argument that reargument petitions are an exceptional form of relief or are not favored; "capital defendants in Pennsylvania routinely seek reargument when their claims for relief are denied, and the Pennsylvania Supreme Court has granted such motions on more than one occasion. See *Commonwealth v. Saranchak*, ... 810 A.2d 1197 (2002) (on reargument, granting reinstatement of PCRA petition that had been dismissed on appeal) [defendant represented by petitioner's counsel]; *Commonwealth v. Young*, ... 748 A.2d 166 (2000) (on reargument, granting relief on claim that was denied in original decision) [defendant represented by petitioner's counsel]"); *see also Commonwealth v. Duffey*, 889 A.2d 56, 75-76 (Pa. 2005) (Castille, J., concurring) (failure to seek reargument may

Castille, of course, could not participate in the consideration of the reargument application; he was already gone. It was left to the remaining justices to evaluate petitioner's claims. After review, the court denied the reargument petition on February 18, 2015 – more than a month and a half after Justice Castille's departure. Joint App. 7a.

In his statement of the case reciting the procedural history, petitioner makes no mention at all of the existence of this reconsideration process.[31] And yet it actually left him better off than he would have been had Justice Castille recused himself to begin with. Petitioner asserts that Castille was in a position to use his putative powers as chief justice to exert disproportionate influence on his colleagues. Brief for Pet. at 48. If petitioner's recusal motion had been granted, however, Castille would still have been on the court. Were he inclined by his putative bias to influence the vote, as petitioner suggests, his colleagues would have known that he could wield his putative powers either before or after the issuance of any opinion he did not like. At the reargument stage, in contrast, that was no longer a possibility.

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constitute waiver; it "suggests, at a minimum, that ... counsel ... was satisfied with the result") (defendant represented by petitioner's counsel).

[31] The single reference to the reargument application, anywhere in petitioner's brief, is on page one, in the Jurisdictional Statement, solely in relation to the timeliness of his certiorari petition. Brief for Pet. at 1.

Petitioner fails to explain what further relief is possible. He says he wants "*de novo*" reconsideration, and that new justices have now been elected to the court. But several of the justices who voted against him before, twice, are still there. If they were "influenced" by Castille's "bias," the influence either remains or it disappeared with his departure. In either case, a repeat reconsideration, in addition to the one petitioner already received, would amount only to a second bite at the apple.

Perhaps petitioner would contend that the "taint" can never be removed from those jurists exposed to now-former Justice Castille, and therefore they too should be permanently disqualified from this case. That was a position open to petitioner at the certiorari stage. But he has now disavowed it with the request for relief in his merits brief.

And if such "touch bias" really were the law, applying to any judge who came into contact with a supposedly biased source, relief would still be impossible in most cases in this Court, in the Pennsylvania Supreme Court, and in any other courts that cannot fill in for recused jurists.[32] Once a justice failed to recuse who should have, every other justice would be disqualified. Any decision they might have rendered would be void, and there would be no way to reach a new one.

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[32] *See* note 29, *supra*.

That would leave many appellants out of luck – especially criminal defendants, who are usually the moving party on appeal.[33] But it would be a boon for *appellees*, like petitioner, whose victory below would become unreviewable.

Be that as it may, petitioner has already received what he is here to get: consideration of his case without the participation of Justice Castille.

But there is also a second reason that further review is currently uncalled for: all Pennsylvania capital sentences have been suspended by a gubernatorial moratorium – and as a result of the moratorium, petitioner's counsel have successfully argued that federal court review of Pennsylvania capital sentences should be placed on hold.

The suspension of federal review arose in a pending Third Circuit appeal, *Fahy v. Comm'r*, No. 14-9002, shortly after the moratorium was declared. On March 2, 2015, the court of appeals directed the parties to address the effect of the moratorium on appeals presenting (like this case) only penalty phase challenges. The Commonwealth asked the court to proceed with the appeals.

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[33] And the impact would be particularly great in states like Pennsylvania, where the court of last resort has mandatory, direct appellate jurisdiction over classes of cases that can be heard in no other state court. In Pennsylvania, this would include all death penalty appeals. 42 Pa. C.S. § 722(4).

Petitioner's counsel, in contrast, repeatedly urged the court to place such cases in suspense. Noting that a legislative body is conducting a study of the capital punishment system, counsel argued that the moratorium "could ... potentially render review of the sentencing issues in this case unnecessary." Fahy's Response at 2, *Fahy v. Comm'r*, No. 14-9002 (3rd Cir. filed Sept. 21, 2015). Counsel further argued that federal court review should be suspended to "show regard for the rightful independence" of pending state executive and legislative action. Fahy's Response at 3, *Fahy v. Comm'r*, No. 14-9002 (3rd Cir. filed Mar. 16, 2015).

The court of appeals accepted counsel's position and has suspended appellate litigation. The court directed the parties to notify it "if and when the moratorium is lifted." Order, *Fahy v. Comm'r*, No. 14-9002 (3rd Cir. June 2, 2015). *Accord Duffey v. Lehman*, No. 12-9004 (3rd Cir. June 3, 2015).

It is unclear when, or whether, that point will be reached. When the Governor declared the moratorium, he issued an indefinite reprieve of petitioner's sentence as "the first step" in implementing the state-wide suspension of the death penalty [34] He further indicated that he would not be satisfied with the capital punishment system unless

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[34] https://www.governor.pa.gov/moratorium-on-the-death-penalty-in-pennsylvania/

and until it was "infallible."[35]

The Commonwealth challenged the legality of the reprieve in the Pennsylvania Supreme Court. That litigation was pending when certiorari was granted in this Court. On December 21, 2015, however, the state supreme court (consisting of all the justices who participated in consideration of petitioner's reargument application) rejected the challenge and upheld the Governor's power to issue the reprieve. *Commonwealth v. Williams*, 2015 WL 9284095 (Pa. 2015). Thus the moratorium, and the resulting federal court litigation suspension requested by petitioner's counsel, will remain in place indefinitely.[36]

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[35] Memorandum of Governor Tom Wolf at 1-2, available online at https://www.scribd.com/doc/255668788/Death-Penalty-Moratorium-Declaration.

[36] Petitioner's amicus asserts that he is under "agonizing ... incarceration on Pennsylvania's death row in solitary confinement." Brief for ACLU at 18.

Last year the Judiciary Committee of the Pennsylvania House of Representatives held hearings on living conditions for capital prisoners. The committee heard testimony from Professor Robert Blecker, who has conducted a nationwide death row study through onsite visits and interviews. Prof. Blecker spent two days examining death row at a state correctional institution in Pennsylvania.

He reported that inmates there live in open-barred single cells on a common corridor. They must remain in cell but are permitted to interact among themselves throughout the day, both orally and visually by using mirrors. There is no mandatory lights out or quiet time; the inmates regulate their socializing and sleep. They receive one hour of daily recreation out of cell,

B. In any event, petitioner was not entitled to disqualify all the remaining justices without first seeking their review of the recusal issue.

One of petitioner's amicus briefs contends that, as a matter of due process, judges should no longer be permitted to make their own individual determination about recusal. Rather, the Constitution should mandate review of the judge's personal decision by some other group of judges. Brief for Brennan Center for Justice at 1, 4. That may well be a reasonable requirement as applied to the issue in the second question presented. If a litigant wishes to disqualify an entire court because one judge failed to recuse, the litigant should surely be obligated to ask the remaining judges to consider the matter first.

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during which they meet in the death row common space or use the basketball court. Reading material is available, along with cable TV.

On one out of every four days, inmates act as a custodian for the corridor. In that capacity they have free access to the unit hallway, and are permitted to interact with other inmates and employees as they perform janitorial duty. Judiciary Comm. Hearing, *Presentation on Pennsylvania's Death Penalty Moratorium*, June 11, 2015, at 147-48, 156-74, available at http://www.legis.state.pa.us/cfdocs/legis/tr/transcripts/2015_0113T.pdf.

Whether the moratorium will result in any change to this housing structure is a matter for the Governor in the exercise of his executive discretion over the department of corrections.

The amicus appears unaware, however, that exactly such a procedure was available here. Petitioner's counsel have availed themselves of it in other recusal challenges concerning Justice Castille, and simply chose not to do so in this case.

In *Commonwealth v. Rollins*, the defendant, represented by petitioner's counsel here, filed a lengthy motion seeking Justice Castille's recusal, and asserting that he was personally involved in authorizing the death penalty many years earlier. *See supra* at 38. After the justice denied the motion in his individual capacity, the defendant filed a "Motion to Entire Court for Recusal of Justice Castille." As the supreme court docket shows, the court considered the motion but denied it the following month.[37]

Similarly, in *Commonwealth v. Rainey*, the defendant, represented by petitioner's counsel here, also moved for Justice Castille's recusal based on his approval of the death penalty as DA, many years earlier. After the justice denied the motion in his individual capacity, the defendant filed a "Motion for Full Court Reconsideration of Order denying Recusal." This time the supreme court issued a published order, explicitly stating that it was granting review, but denying relief. The order specifically notes that "Justice Castille did not participate in the consideration or decision of this matter."

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[37] *See* note 18, *supra*.

Commonwealth v. Rainey, 911 A.2d 505 (Pa. 2006).[38]

As these cases demonstrate, petitioner plainly had the means for further review in this case. Petitioner asserts that he did ask Justice Castille to refer the matter to the full court. Cert. Reply at 2. By petitioner's own logic, however, that was no different than asking him to decide it by himself. The way to seek full court review was to ask the full court.

Yet petitioner seems to have gone out of his way not to do that, and not just once. He raised the recusal issue only one time, at the beginning of the case, in response to the Commonwealth's emergency application to lift the stay entered on the eve of execution. He targeted the motion explicitly to Justice Castille; but after Castille voted in his favor to maintain the stay, petitioner never mentioned the recusal issue again. Two more years passed before the court issued its opinion on the merits; petitioner never asked the court to prevent Castille's participation. And even *after* disposition of the case, and after Castille had retired, petitioner said nothing; his reargument application attacked the court's reasoning but said not a word about the "bias" that supposedly tainted the whole process.

If due process ever demands the disqualification of

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[38] *See also Commonwealth v. (Roy) Williams*, 732 A.2d 1167, 1174 (Pa. 1999) (full court, per Saylor, J., addressing and rejecting claim by petitioner's counsel that prior counsel was ineffective for not seeking Justice Castille's recusal on direct appeal; citing *Aetna Life*).

an entire court because of one member's failure to recuse, it certainly first requires notice to the remaining members that the issue exists. That did not happen here.

C. Petitioner's "total disqualification" rule is contrary to constitutional precedent and judicial practice.

Petitioner's demand for relief also suffers from a more fundamental obstacle: Castille wasn't the only judge on the case. There have been two major rulings in petitioner's latest collateral appellate litigation. The first – the stay motion – he won, unanimously. The second – the merits decision – he lost, also unanimously. While his evidence of Justice Castille's supposed bias is attenuated, his evidence of any unfairness by the other justices is non-existent.

Petitioner proposes an easy solution: presumption. He insists we must simply assume that all five other justices on the Pennsylvania Supreme Court were likely to be biased, merely by virtue of their association on the case with Castille.

He calls this presumption "structural error." But the use of that label here serves only to sidestep the standard set by this Court in *Caperton*: whether the decision below was the product of "a constitutionally intolerable probability of bias." 556 U.S.at 882. Since the decision below was not Justice Castille's, but the court's, it is not enough for petitioner simply to note Castille's past and be done. He has to show that one judge's 30-year-old involvement would overpower not

only his own judicial duty, but that of every other judge who examined the case.

In place of doing that, petitioner invokes the concept of "collegiality." He cites various lower court opinions, and even psychological studies, for the idea that appellate judges interact with each other in deciding cases. No doubt they do. Petitioner never explains, however, why judicial influence would operate in only one direction – from the "tainted" judge to the untainted ones. In fact, just the opposite is the case. Each judge on the court must conduct an independent consideration of the legal issues before exercising his or her individual responsibility to cast a proper vote. In the exchange of viewpoints, extreme or ill-considered positions are moderated – or outvoted. That is why we have courts with more than one judge.

Petitioner's approach, in contrast, is the social science equivalent of a platitude: one bad apple spoils the bunch. But judges are not apples. The law presumes that judges will carry out their duty to maintain impartiality, even in the face of potentially prejudicial information. It is a venerable rule,[39] and a powerful one, applying even to evidence a judge hears but could not constitutionally consider.[40]

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[39] *See, e.g., Field v. United States*, 34 U.S. 182, 201 (1835); *United States v. King*, 48 U.S. 833, 854-55 (1849); *Sinclair v. United States*, 279 U.S. 749, 767 (1929).

[40] *See Harris v. Rivera*, 454 U.S. 339, 346 (1981); *Williams v. Illinois*, 132 S. Ct. 2221, 2234-35 (2012); *see also United States v.*

This principle – that judges do not automatically become tainted by exposure – is even more compelling at the appellate level than in the bench trial context where it usually applies. Findings of fact are a locked box: neither judges nor juries need explain their verdicts. But explanation is the essence of the appellate process. The rationale for decision is available for inspection. Instead of speculating on the thought processes of the remaining justices, we can read their opinion.

Petitioner gets this notion backwards. He contends that, because appellate courts deliberate in secret, we don't know what the judges are thinking in chambers, and we must fill in the gap by assuming that the presence of a non-recused judge has "infected" all other members of the court. Brief for Pet. at 38. In determining whether due process has been violated, however, "[t]he inquiry is an objective one." *Caperton*, 556 U.S. at 881. There is no basis for stacking the deck with petitioner's subjective assumption of "infection." The question is whether the objective circumstances created an intolerable probability that the other judges were themselves actually biased. Here there is

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Brooks, 355 F.2d 540, 542 (7th Cir. 1965) (coerced confession); *United States v. Cardenas*, 9 F.3d 1139, 1154-55 (5th Cir. 1993) (*Bruton* claim); *United States v. Foley*, 871 F.2d 235 (1st Cir. 1989) (applying "presumption of judicial regularity" concerning other-crimes evidence and racial epithets; if trial judge could not put aside prejudicial information, neither could appellate judges on review); *Republican Party of Minnesota*, 536 U.S. at 796 ("We should not, even by inadvertence, impute to judges a lack of firmness, wisdom, or honor") (Kennedy, concurring).

simply no evidence of that.

Petitioner's presumption is also inconsistent with judicial practice. Petitioner maintains that we must invalidate even a unanimous ruling because it is not the decision that matters but the deliberation. Thus, the "taint" is transferred to each member of the court unless the tainted judge refrains from "participating in the case at all." Brief for Pet. at 39. Yet there are many appeals in which a judge recuses only *after* he has devoted substantial judicial time to the case. It is common practice for the remaining members of the panel to proceed to a decision, even where the "tainted" judge participated in oral argument or beyond.[41] Under petitioner's rule, all that would have to stop. And by the same token, it would be impossible ever to "cure" a conflict mid-case; the damage would

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[41] *See, e.g.*, *Harned v. United States*, 511 F App'x 829, 830 (11th Cir. 2013) (per curiam) (nonprecedential) (granting petition for rehearing to reflect that third member of panel recused herself following petition for rehearing and then reissuing opinion in name of two-judge quorum); *Woodlands Ltd. v. Nationsbank, N.A.*, No. 97-1813, 1998 WL 682156 (4th Cir. Sept. 23, 1998) (nonprecedential) (case decided by remaining two members of panel following third member's recusal after oral argument); *Whitehall Tenants Corp. v. Whitehall Realty Co.*, 136 F.3d 230, 232 (2nd Cir. 1998) (rejecting challenge to two-judge quorum's deciding case following recusal of third judge after oral argument), *Tagatz v. Marquette University*, 861 F.2d 1040, 1042 n. * (7th Cir.1988) (decision by two-judge quorum following post-argument recusal of third member); *Giacalone v. Abrams*, 850 F.2d 79, 80 n. * (2d Cir.1988) (same); *Love v. Young*, 781 F.2d 1307, 1308 n. * (7th Cir. 1986) (same).

already have been done.[42]

For this reason, petitioner's presumption cannot explain even his own cases. In most decisions he cites, courts vacated panel rulings where they determined that one member should have recused, and remanded for reconsideration by the remaining panel members. But if fellow judges were tainted by exposure to a "biased" judge, they were still tainted when they re-decided the same case: their minds were not erased, especially where that same judge was still sitting down the hall. And if they were *not* tainted when they re-decided the same case, there was no cause for invalidating their original, independent votes to begin with.

Any claim of "contamination" from Justice Castille's non-recusal is particularly forced given the circumstances of this case. Castille did not cast the deciding vote; indeed the decision was 6-0.[43] Castille did not author the opinion of the court; indeed he wrote a concurring opinion in which no other justice chose to join. Castille did not rush his colleagues to judgment; indeed he joined them in upholding a stay of execution that has now been in place for years and will remain so indefinitely.

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[42] *See, e.g., Federal Energy Regulatory Comm. v. Electric Power Supply Assoc.*, No. 14-840 (U.S. Oct. 15, 2015) (letter from clerk) (curing conflict after oral argument).

[43] The court is often divided; in petitioner's 2004 appeal, for example, the vote was 4-1-2. Joint App. S.

Petitioner nonetheless contends that Castille must have wielded improper influence by virtue of his status as chief justice. Brief for Pet. at 47-48. He misapprehends the nature of that position. The justices of the Pennsylvania Supreme Court maintain separate chambers around the state and come together for argument and conference sessions nine times per year. http://www.pacourts.us/courts/supreme-court/calendar. The Pennsylvania Constitution designates one of the justices as chief justice, solely on the basis of seniority on the court. Pa. Const. Art. 5, § 10(d).

But neither the constitution nor any statute gives the chief justice a single power over the other justices of the court. Petitioner cites to internal operating procedures that place various administrative responsibilities on the chief justice. But all IOP's and rules of judicial administration are, as a matter of constitutional mandate, within the exclusive province of the supreme court as a whole, *id.* at § 10(c); they are promulgated, enforced, and modified only by the act of a majority of the justices. The chief justice's only "powers" over his colleagues are those they afford him.

In any event, petitioner ignores the most salient fact about Castille's authority as chief justice: it was done. This was one of his final cases on the court before mandatory retirement. The other justices all knew that. If we would conclusively presume that he tainted them, when did it stop? If not then, why now?

Conclusion

For the reasons set forth above, the Commonwealth respectfully requests this Court to affirm the judgment of the Pennsylvania Supreme Court.

Respectfully submitted,

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RELEVANT DOCKET ENTRIES FROM THE SUPREME COURT OF PENNSYLVANIA
No. 98 E.D. APPEAL DOCKET 1987

Commonwealth of Pennsylvania v. Terrance Williams

* * * *

Appeal from: Order entered 7/1/87

Court below: C.P. Criminal

County: PHILADELPHIA

No. below: 2362-2367 August Term 1984

Judge below: David Savitt, J.

Notice of Appeal filed below: 7/21/87

NATURE OF CASE: DEATH PENALTY

NOTICE OF APPEAL DOCKETED IN SUPREME COURT: 7/24/87

Fee Paid: In Forma Pauperis: x

ORIGINAL RECORD FILED:

10/19/87. Record, 21 vols. Testimony, 1 envl. Exhibits

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Appellant's Brief and
Reproduced Record due: *10/14/88*

Appellant's Brief filed: *9/27/88*

Reproduced Record filed: _____

Appellee's Brief due: *2/27/89*

Appellee's Brief filed: ~~*9/27/88*~~ *error rm*
D.A.'s 2-27-89
A.G. 3-29-89

Date	Filings-Proceedings
	* * * *
10/23/89	**ARGUED: J/159**
2/8/90	DECISION: The convictions and sentences imposed below are affirmed. McDermott, J.
2/8/90	Judgment entered.
2/28/90	RECORD EXIT TO GOVERNOR CASEY
5/22/90	ORIGINAL RECORD, AS FILED, REMITTED.

[THE LEGAL INTELLIGENCER, October 28, 1993]

State Voters Must Choose Next Supreme Court Member

Three Candidates Answer Tough Questions on the Law, the Court and Justice in Pa.

BY LISA BRENNAN
Of the Legal staff

IN PICKING PENNSYLVANIA'S next Supreme Court justice, statewide voters will choose between three little known Southeastern Pennsylvanians – Philadelphia Common Pleas Judge Russell M. Nigro, former Philadelphia District Attorney Ronald D. Castille and West Chester attorney Robert B. Surrick.

They're running for one vacancy on a court that experts say is in the throes of the worst breakdown of collegiality in the court's history. All three candidates, Democrat Nigro, Republican Castille and Patriot Party candidate Surrick, contend that if elected, they'll bring integrity to the job and set an example for their colleagues.

The justices, like the better part of the voting public in this low-turnout election year, aren't likely to be paying much attention to this judicial race. They're sweating out the overdue results of a special grand jury investigation into Justice Rolf Larsen's charges last winter of case-fixing and bribe-taking against two colleagues, one of whom, Justice Stephen Zappala, he later accused of vehicular homicide. Investigators

promise to go public with the grand jury investigation results today.

Issues of particular interest to the legal community distinguish Nigro, 47, from Castille, 49, from Surrick, 60. They were explored by a group of lawyers familiar with the candidates' careers and credentials who are members of the *Editorial Board of The Legal Intelligencer*.

Michael Bloom, Benjamin Lerner, Nancy Wasser and board co-chair Seymour Toll spent 50 minutes apiece with each candidate. They talked about everything from campaign finance restrictions to the need for public accountability from a dilatory Supreme Court, which has immense administrative rulemaking and disciplinary powers that extend far beyond resolving legal disputes, and has never been held to the same oversight as other government agencies that spend taxpayer money. Here are some of the highlights.

CAMPAIGN FINANCE RESTRICTIONS, MERIT SELECTION

Castille, Nigro and Surrick understand the rigors of having to campaign and raise money. To get around that in the next Supreme Court race, Castille and Nigro support legislation calling for merit selection of statewide appellate judges. Both agree on imposing campaign finance restrictions in order to take judges out of the nasty business of having to raise money.

"I was driving around in a Corvette convertible recently throwing candy to kids on the side of the road

in a parade," begins Castille, relying on his greatest charm – a little homegrown humor – before trying to answer a question on campaign finance restrictions. "I said to my driver, 'Is this going to make me a better Supreme Court justice?'" He said it might. "Maybe some of our Supreme Court justices need to ride around in a parade."

Castille said the rigors of campaigning keep qualified candidates in high paying jobs from running for the high court.

"There are individuals who'd just love to sit on the Supreme Court of Pennsylvania, and would give up beautiful jobs – people who make $900,000-a-year. Bruce Kauffman would give up his job in an instant. But he doesn't want to do it because he doesn't want to go out there to places like Lower Turkeyfoot, ... and Tinicum."

As long as judicial campaigns are necessary in Pennsylvania, Castille says campaign fundraising restrictions should be imposed. "The best one is public financing similar to some of the federal statutes – if you raise a certain amount public financing will kick in," he says.

Nigro, the most successful fundraiser in this race, goes even further. All judicial candidates, he says, should be given public funding "so they don't have to raise 10 cents."

Not that he expects public financing to happen anytime soon "because it took such a long time in the federal process just to get people to check off a dollar on

their tax returns and then have a matching funding situation."

"I'd love to be able to say, 'Here's X dollars, you don't have to raise it.['] But for that, we're forced to do it because there's no other way to get your message out. That's a sad set of circumstances."

To sidestep the built-in conflict-of-interest in accepting campaign contributions from members of the legal community, Nigro says he's tried to "reach out to as large a group of people as possible" to avoid an awkward situation, win or lose.

"I probably see more lawyers than any other judge because of my programs. We didn't want to be in that kind of situation, so I told the committee very early on to solicit its contributions from as wide a range of both non-lawyers and lawyers as possible."

Nigro's biggest regret is not being able to "have met all five and a half million registered voters." He says he tried. That effort, some estimate, could end up costing him $2 million. Last summer, for example, after sitting in court every weekday, Nigro says he "spent every weekend and evening out doing something."

"I spent a lot of time in my automobile, some time in a helicopter – and I'd rather not have been going over mountains in a helicopter – and some time in a twin-engine plane."

For all that's been made of Nigro's association with state Sen. Vince Fumo, the chairman of the Senate Appropriations Committee, the candidate has received

substantial campaign contributions from the mayor of Philadelphia and other sources that he controls.

If elected, Nigro says he won't get near cases involving the city or the senator in his governmental or personal capacity, unless he can be truly neutral, fair and even-handed.

"In my six years on the CP bench the senator hasn't had one case with me," Nigro, says. "I could have 100 lawyers agree that I decided the case on the merits and no one will believe it. He'll never be in my courtroom on the CP level or any other level.

"You may hear certain things about me, but you won't hear, 'He decides cases other than on the merits.' There's been ample opportunity for state and local bars to get some lawyers to come forward and say, 'The guy's a bad guy.' Nobody came forward. The reason is, it simply doesn't happen.["]

Nigro says Mayor Rendell made a $20,000 campaign contribution and a $100,000 loan, $80,000 of which has already been paid back.

"I'd like to think the contribution the mayor made is because he felt I was the best qualified candidate in this race," Nigro says. "He'll get no special treatment."

In contrast to Castille and Nigro, Surrick believes merit selection is doomed. He's calling for a constitutional convention to abolish the court and carve up the state into seven judicial districts. Voters in each geographical area would elect a justice whose campaign costs would be negligible, compared with the cost of

running statewide. Surrick contends there'd be no need for campaign finance restrictions.

"The problem is statewide election of appellate court judges," Surrick says. "Nobody knows who the candidates are. The Republican and Democratic parties control their nominating process.["]

"The way you win this election is if you get special interest money, and specifically, I'm talking about the Pennsylvania trial lawyers, who put hundreds of thousands of dollars into these races, for what reason we can only speculate on; and three weeks before the election, the candidates go on the boob tube and hope to convince people that they're the reform candidate. Russ Nigro running as the reform candidate is a little amusing to me."

Surrick calls judicial campaign fundraising "cigar store Indian contests – before they get a cigar store Indian, they say they can't say anything because of the Code of Judicial Conduct, and whoever raises the most wampum wins the election."

Relying on two charts, Surrick's solution is to fill the court with at least five justices who come from counties besides Allegheny and Philadelphia. His plan will be explained in more detail below. But his proposal does not free a judicial candidate from having to raise money.

"Justice Ralph Cappy spent $1.5 million on his campaign in 1989. I would guess Nigro's probably going to spend $2 million before this is over. And that only counts the hard money; it doesn't count the other

money. Under my plan, you wouldn't have to spend that."

Surrick was a longtime proponent of ending the election of statewide judges in favor of the merit selection process whereby the governor picks judges from a list of nominees provided by an appointed panel of lawyers and non-lawyers. He says he "got really turned off on merit selection when I read that Vince Fumo said in *Philadelphia Magazine* that he's in favor of merit selection because he can then do in 15 minutes what it used to take him six months to do."

Philadelphia Inquirer reporter Katharine Seelye wrote last week that Surrick misattributed the quote. It was from Fumo's longtime political mentor Buddy Cianfrani, who was speaking of Fumo. The quote was: "He won't have to worry every election. He'll do in five minutes what now takes months."

Surrick says the "biggest problem" with merit selection today is "who picks the pickers." Second to that, he says court reformers "caved into Fumo on the two-thirds senate confirmation."

"Nobody can get two-thirds unless a deal gets cut. It's like when John Herron was turned down five times by the Pennsylvania senate with Vince saying publicly, 'That boy doesn't know how to play the game.' It was only when he was elected as one of the Casey Five was he confirmed before the Senate.

"Humans being what they are, it can get perverted. We just change how we pervert the system."

SPEAKING-OUT ON ISSUES THAT MIGHT COME BEFORE THE COURT

Castille, Nigro and Surrick are aware that special interest groups capable of giving money to control votes would love to hear their positions on gun control, abortion, the death penalty or any hot issue of the day.

Under the current restrictions, Castille says if candidates take positions then they'll have to recuse themselves from any decisions in those cases.

"There's really no solution to it," Castille says. "You ask people to vote for you, they want to know where you stand on the death penalty. I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get the hint."

To solve the problem, Nigro believes that public financing of judicial campaigns should be combined with relaxing the rules about discussing issues and eliminating the need for recusal down the road.

"Then you don't have this special interest problem," says Nigro. "I won't be allowed and the committee won't be allowed to get any money from organizations. So, if I come out against a particular issue, and there isn't going to be any recusal potential, you don't have a problem and everybody's needs have been met."

No matter what his personal views are, Nigro pledges to decide cases on their merits.

"I may say constitutionally I have to do XYZ, but it still means that someone has to meet the burden of proving a particular element in a particular type case."

Nigro, like Surrick, prefers to speak his mind.

"It probably gets me in trouble half the time because I speak out on the way I feel and people just have to understand that that's the way I am."

After six years of being threatened with disbarment, Surrick took an appeal of a disciplinary board reprimand to the state Supreme Court and won 3-2, in 1989, during a brief spell when Justice Juanita Kidd Stout sat on the court. Surrick felt constrained to discuss the matter until West Chester attorney Sam Stretton succeeded, however briefly, in asking a federal judge to strike the prohibition against speaking out on issues that come before the court.

The decision by U.S. District Judge Clarence Newcomer was struck down on appeal.

"The 3rd Circuit reversed because it said the Judicial Inquiry and Review Board had agreed to a narrow interpretation of the meaning of those words in the Code of Judicial Conduct.

"What the 3rd Circuit decision really says is you can't pander to special interest groups and promise your vote in return in matters they might be interested in. I don't have any problem with that," Surrick said.

During the six years he fought disciplinary action for making a memo public that he'd received as a JIRB

member, Surrick says he spent $50,000 in legal fees. Surrick claims he's being investigated again for alleging that Larsen handled cases improperly.

"I believe I will always come down on the side of the ability of people to speak as opposed to being muzzled. Nothing good happens in the dark."

Improving Collegiality

Moving from the election to the job itself, Castille, Nigro and Surrick say that, if elected, they'll be joining a group of people who can't stand to be in the same room together. All three candidates believe they can improve the internal workings of the court from deciding of cases to the making of rules and the setting of administrative policy.

Aside from a few challenges before the high court when he was District Attorney, Castille says he can foster collegiality on the court because "I don't come on to it with any enemies that I know of."

"I've had to call them publicly on a few things like the speedy trial rule. But I think I come in there as someone who no one up there has a vendetta against me, or wants to run me over with a car or anything like that."

Castille and his challengers believe that this election is "beginning a whole new change in the court."

"Within the next 10 years, there'll probably be about five more justices who'll turn 70," says Castille. "Justice Papadakos goes in two years, Justice Nix in 1997,

Flaherty's approaching his mid-60s, Zappala goes in 2003 or 2004. So that leaves Cappy and myself. It will be a total change; it will give people new outlooks, and their old hatreds will end with the passage of time."

Nigro says his collegial personality will help the process of healing the high court's rifts.

"From a personality standpoint, I get along with people," says Nigro. "This race is going to require the next person to go on that court to be able to mix to a degree."

Nigro believes the grand jury investigation results could be bad for Larsen. And he notes that Papadakos isn't long for the court either. The way he sees it, in a three-year period of time, there could be four new members of the court.

"It's without question that Justice Papadakos, at best, will serve one year, assuming he wins the retention election this year. The chief justice is already into his mid-60s, and one of the compelling reasons he remains on the court is not to allow Larsen to assume the role of chief justice.

"So I think you have to look at this election in terms of a) what can I do, to start with, come January and then, b) will I be the first in a group of four who will have a different mentality about public service?

"I would venture to guess that no matter who gets elected will have no relationship with Justice Larsen. I'd have to say that Bobby Surrick is going to be totally ineffective – he has maligned five of the six members of

the court he's going to sit on. How's he going to mix with the members of that court? If you call somebody a crook, it's going to be difficult to sit in a room with them and try to discuss cases.

"I think my personality is of a nature and my work ethic is of a nature that we're going to be able to make a lot of inroads and be able to move forward and do some things that will be positive in nature."

Surrick dismisses allegations that his presence would only make a bad situation worse.

"I don't accept that premise," says Surrick. "The very fact that someone of character and integrity is up there and says 'Hey this is wrong' is going to make a hell of a lot of difference up there.

"I'd like to think I'm a good lawyer. I'd like to think I could ably discharge my responsibilities as a justice and set a little bit of a standard. I don't think you've got that now and don't think you'll get it if either of my opponents get elected."

Surrick says his candidacy has made a change already, saying he was the one who focused the campaign on the high court's policy of reimbursing justices for up to $25,000 in annual expenses that don't have to be accounted for.

"If I get elected it's going to break the system open," Surrick says.

CONTINUING LEGAL EDUCATION

Castille, Nigro and Surrick agree that legal education in ethics ought to be mandatory for judges. The state Supreme Court has required it of lawyers and changes are underway now to increase the requirement by an hour, from five to six, and decrease the ethics requirement from five to two hours.

Castille says continuing education is especially important for lawyers with different concentrations to study new developments in their fields.

"Should they be mandatory?" he asks. "It's probably for the good of the profession. But there ought to be a discussion if any of that stuff is implemented."

"And if the judges are going to impose it on us, we ought to impose it on them. There's a lot of judges who want it. They're just afraid they'll make it a weeklong, all-day process. Let's talk about that and make a rational decision. The Supreme Court is the court of last resort, but it's certainly not the font of all knowledge."

As a member of the Philadelphia Common Pleas Court's Sheppard Committee, Nigro said his group voted unanimously "to indicate to the Supreme Court that they ought to take the lead and offer it to themselves."

"They were no[t] so inclined on the high court to get involved in it," Nigro says. "I understand it's still being talked about by judges on state trial level. I would venture to guess it will carry the day.

"Will I push for it on the court?" Nigro asks. "Lawyers have to participate. Judges ought to participate. I would individually participate and hope that the other six follow the lead. I can't make them do it. That goes without question. But I think I could set an example."

Surrick filed a petition for extraordinary relief with the state Supreme Court asking them to make ethics training mandatory for judges.

"I did it just to tweak them – I knew what the answer was going to be. First they denied it in a per curiam order and later denied my petition for extraordinary relief with no explanation."

But that wasn't the first time Surrick spoke up on the issue of mandatory judicial ethics training. In 1982, as a member of the Judicial Inquiry and Review Board, he put to a vote that the board require judges in the state one day a year to attend instruction on the Code of Judicial Conduct.

"Some judges, like Justice McDermott from Philadelphia, said he'd never read it and he didn't need a code of conduct, he had his own code," Surrick says.

"A lot of judges don't know what's in the code, a lot of lawyers don't know what's in the rules of professional responsibility. I don't have any problem with everybody taking it. I'd broaden it, though. There should be education in lots of areas."

PUBLIC ACCOUNTABILITY

Castille, Nigro and Surrick believe the high court should seek input from the bar before it issues administrative decrees and promulgates formal rules. They also believe the court should issue frequent, regular and public reports revealing its internal operations.

Castille says no group of seven can think of every possible ramification of its actions. He gave an example of how the high court's secretive rulemaking left his life in turmoil when he was District Attorney.

"On New Year's Eve one year, they came up with this rule that said anybody in prison who'd been charged with a crime has to be tried within 180 days or they're let out," Castille says. "And if they're not in prison they have to be tried in 360 days or their case is thrown out. We came back Jan. 2 and it was total turmoil, chaos, nobody knew what was going on. I actually had to go out and hire one of the top seven accounting firms to try and determine the practical effect of that decision.["]

"They ought to have a broad input into these things." Nigro says there has to be "someone at the top" making the decisions "otherwise, you're going to have extreme difficulties in terms of management." He promises, if elected, to go out in the weeks the court's not in session and get input from local bar groups, judges and community groups "in an effort to be a goodwill ambassador and educate the public about what the court system's about."

Surrick suggests creating a commission "to take away some powers – the power to discipline judges and lawyers and the power to deal with judicial disability."

"If you take those powers away from the court, I don't think we're going to have nearly the kind of problems we have," says Surrick.

On the specific issue of the Supreme Court exercising supervisory powers over local courts, Castille and Nigro said it was necessary two years ago in Philadelphia, even if people had legitimate complaints about the manner in which it was done.

"Our court had some problems back then," says Castille. "The justices are given supervisory authority for all the courts in the state and if there are problems in the system, they ought to exercise it.

"Maybe their approach should have been a little different with Papadakos coming in and screaming at everybody. Perhaps Justice Cappy's approach was better, 'Let's sit down and talk about what we can do.' The system might be better off for it because there was a lot of fat that was squeezed out."

DISCIPLINARY BOARD RECOMMENDATIONS

Castille, Nigro and Surrick are aware in varying degrees of the criticism that it depends on who you are on whether the lawyer disciplinary board recommendation is reversed and the sanction it recommends is upgraded or downgraded, and that findings of fact reached by the board have been overruled.

"The discipline process for lawyers and judges is extremely important," Castille says. "The court should defer to its own agencies."

Nigro is offended by the suggestion that the high court could overrule the disciplinary board's findings of fact.

"If you're going to ask an investigative process to take place and have the opportunity to have evidence from both sides, you should only be reviewing the record that's made to make sure it fits the recommendation as opposed to adding and subtracting based on their own personal feelings," says Nigro.

Surrick describes his personal experience with the process that was initiated at the request of Larsen, after Surrick made public details of a case before the JIRB 10 years ago involving Larsen. They have waged a bitter feud ever since.

"I went through six years of hearings with the disciplinary board," Surrick says. "They couldn't find anything. But they couldn't go six years and not do something, so the board said I ought to get a private reprimand.

It was a 2-1 decision with Gene Green of Montgomery County saying it seemed to him 'exquisitely inappropriate in the year of the 'veneration' of our constitution and John Peter Zenger that Bob Surrick should be subject to discipline for revealing to the world the manner in which the Pennsylvania court system had failed.'"

"I took an appeal from that to the Supreme Court and won on a 3-2 vote; Zappala and Papadakos against. One of them equated me to a cocaine smuggler and murderer, and it rolled off their tongues so easily that 'I would disbar this man without hesitation.'"

Surrick says he knows a lawyer who was suspended by the lawyer disciplinary board for five years, the Supreme Court reduced the suspension to four, and a connected lawyer was able to get the suspended lawyer's license reinstated.

"All of a sudden his license is back and he's practicing and not a thing is happening," says Surrick. "It's like 'I like you, you keep your ticket; I don't like you, it's pulled.' We've got to professionalize that whole business. The people who set up the disciplinary board did it in good faith believing that honorable people would administer it. It's not honorable it's full of politicization, and chasing me is an example of it."

MANDATORY MINIMUMS AND SENTENCING GUIDELINES

Castille and Nigro, in the time they've spent trying and hearing criminal cases, have had experience with the imposition of mandatory and guidelines sentences. Nigro and Surrick believe the present system has failed because it doesn't strike an appropriate balance of judicial discretion versus legislative mandating. Castille, who claims to have authored 25 pieces of sentencing legislation, believes it has worked responsibly.

"I've done things such as write the mandatory minimum statute for drug dealers in Pennsylvania," Castille said. "But I've been responsible in writing it."

Nigro feels so strongly about the issue that he's already begun to speak to legislators about repealing legislation on mandatory and guidelines sentences.

"I think we would do far better to eliminate the sentencing guidelines and the minimum mandatories and let the judges mete out the punishment as fits each crime and as fits each circumstances that are presented before it," Nigro says.

"I happened to speak yesterday at the House Democratic Caucus and said to them if they wanted to be more responsive to the needs of the general public, specifically in the area of the courts, they ought to have more judicial input.

"I have been reversed a few times – it's been on the issue of mandatories. The interesting thing about it is when the cases come back on remand, the D.A.'s office allows me to sentence the same way I did the first time because I think they feel the pressure of this whole prison cap and all the people who have to be imprisoned.["]

Surrick also says he's against hamstringing judges so that they're unable to deal with the circumstances.

"I'm opposed to mandatory sentencing," says Surrick. "I think it's a good idea that failed. You get into the political spectrum and the law-and-order jingoism of tough judges and tough sentences and all

that kind of stuff. If you pay somebody $95,000 a year or $100,000 a year they ought to have some discretion."

FULL DISCLOSURE OF COURT FINANCING

The Beck Commission recommended full disclosure of the Supreme Court's budget and operating expenses and currently, there's no line item detail in the court's budget that's made available to the public. All three candidates believe the court should account for how it spends taxpayer dollars.

"I guess it comes from my previous political experience. My philosophy is don't spend a cent of taxpayer money unless they have a right to know where the money's going," Castille says.

"One of the things I've called for is the elimination of the $25,000 a year unaudited expense account that the justices have. I don't know whether that $25,000 covers what they spent at the Four Seasons, or if that's paid for by some other budget."

Nigro agrees that all taxpayer dollars should be accounted for in some public manner.

"I don't know how you can take taxpayer money and not tell them where you're spending the money," Nigro says. "I don't care what aspect of governmental life you're in. How do you take $5 out of his pocket and then say, 'Hey by the way, I'm not going to tell you where it's being spent.' I don't know how Justice Papadakos can say, for example, 'I don't want you to know where unreported expense money goes because I might

be out to dinner with somebody who you might not think I should be out to dinner with.'"

SURRICK'S PLAN

Surrick says he doesn't care about losing, but refuses to give up campaigning for abolishing the court. He says five other states have adopted a plan identical to his, including Illinois, "where the bookends at either end of the state are weighing the whole process down."

"I think it has a lot of appeal to a lot of groups," he says. "Every vote I get will add weight to my ability to go to the legislature with the plan." His plan pushes the concept of "judicial districts based on diversity." He explains why geographical diversity is significant on an appellate court as opposed to a legislature.

"All seven justices on the Pennsylvania Supreme Court have bubbled up through the corrupt or arguably corrupt political system," Surrick says. "You don't bubble up through those systems unless you have a go-along, get-along mentality. All of these people are products of that. We have seven of them. I think it would be healthy to have somebody from Lancaster or somebody from Columbia County or somebody from Centre County or somebody from Crawford County. They see the world differently."

CASES BEFORE CASTILLE

Given the cases out of Philadelphia in which prosecutors have been charged with misconduct either in the prosecution of the case or in closing arguments, does Castille feel comfortable hearing those cases?

"That shouldn't be a problem for me," he says.

GENDER FAIRNESS

On the issue of appointing a gender fairness commission to evaluate gender issues throughout the state court system, Castille says if someone can show him there's a problem, he'll look into. Nigro called on the Supreme Court to form a gender bias task force during his campaign. And Surrick says he supports the idea.

"If there's a problem, it should be looked at," Castille says. ["]I don't know why the Supreme Court has twice refused to look at it. Before I'd form a commission, I'd have to see what has caused this. Have there been any studies? I've never been one to jump in unchartered waters. Let's see some evidence of the problem. If there is I'd be glad to address the problem."

OUTPUT OF COURT

All three candidates say they will put pressure on the Supreme Court to increase its output. Over the past few years, the court has developed the practice of having long stretches of silence followed by the release of 30 or 40 opinions and then long stretches of silence again.

"I've found the Supreme Court's decision-making per justice has dropped about 50 percent in the last five years from 45 to about 23," opinions per justice, Nigro said. As we go around the state, the lawyers ask, 'Judge, if you become a member of the high court, can

I get my petition for allocatur denied in 90 days instead of two years? If you want to deny my case, it's okay, just let me tell my client it's over.'

"We indicated we'd go to the other justices and say we'll do more."

CASTILLE'S EXPERIENCE

Castille dismisses the criticism that his experience is too narrow.

"I'm the only one in my family who went to law school and at that rate I'll be the only one to sit on a state Supreme Court. I look to it as the ultimate challenge as a lawyer, as a public servant. People say you ran for mayor, you really didn't want to be mayor. To a certain extent I didn't because you really have to give up the law totally I enjoy it. I enjoy trial work. I don't bring just the narrow perspective of prosecutor to the court because I've been more than that.

"The D.A. has to do many more things than prosecute cases, lock up criminals. I've been in private practice for two-and-a-half years. I've defended cases – [I've been] a plaintiffs' attorney down there in federal court, a plaintiffs' attorney over here in the state court. Nobody's got my administrative experience."

Three lawyer surveys have been taken showing large majorities of respondents think Papadakos unqualified for retention. At the same time the Pennsylvania Bar Association found him qualified.

Surrick says [he] criticized the state bar but apologized to the Philadelphia bar for putting it in the same category.

"In 1987, the PBA found Justice Larsen qualified for retention when everybody knew what kind of person he was. They found Papadakos qualified. They found Russell Nigro highly recommended in the primary and reduced Judge Doris Smith's rating. I'm glad she had the courage to scream. It's a shame the way it's been politicized.

"I have an apology to make to the lawyers of Philadelphia because I lumped the Philadelphia bar into the same pile as the Pennsylvania bar and I was dead wrong. I didn't participate in the Pennsylvania bar game because I knew it was a rigged game. And I didn't pay any attention to Philadelphia Bar chancellor Andre Dennis when he called me and asked 'would you please participate?'["]

BALLOT QUESTION

How does Surrick react to the effort of the Republican State Committee to keep him off the ballot?

"Let's view my answer against the backdrop of Pennsylvania probably being the toughest state in the country for third party access," Surrick says. "The people in Harrisburg have written the rules in such a way as to maintain third party continuity – to require third parties to go out and get enormous numbers of signatures every election.

"The manipulation of the court system for their gain to keep me in limbo is an inappropriate thing to do. We're not running for ward leader. We're running for the Supreme Court of Pennsylvania."

"But this entire campaign, I've been treated like a poor relation at a society wedding."

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 192 CAPITAL APPEAL DOCKET

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

SAHARRIS ROLLINS,

Appellant.

APPELLANT'S MOTION FOR RECUSAL OF JUSTICE CASTILLE

On Appeal from the Order of the Philadelphia County Court of Common Pleas (May 8, 1997) (Sabo, J.), Nos. 585-588 April Term 1986, denying relief under the Post-Conviction Relief Act and Habeas Corpus

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Dated: October 13, 1998.

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and Table of Authorities Omitted]

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**IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT**

COMMONWEALTH	:	No. 192 Capital Appeal Docket
Respondent/Appellee,	:	THIS IS A CAPITAL CASE
v.	:	
SAHARRIS ROLLINS	:	
Petitioner/Appellant	:	

**MOTION FOR RECUSAL
OF JUSTICE CASTILLE**

Appellant, Saharris Rollins, respectfully moves for the recusal of Justice Ronald D. Castille from consideration of his case or, in the alternative, from the consideration of his Application for Remand.

In brief, the factual grounds of this motion arise from Justice Castille's service as District Attorney at times relevant to Appellant's charging, trial, and direct appeal, as well as his involvement in Appellant's particular case.[1] Justice Castille should not participate in hearing the case, because "he has personal knowledge of disputed evidentiary facts concerning the proceeding," because "his impartiality might reasonably be questioned," because "he served as a lawyer in the matter in controversy," because "a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter," and because such lawyer is "a material witness concerning it." Code of Judicial Conduct, Canon 3(C)(1)(a)-(b) (1998).

I. Factual Background

Appellant, Saharris Rollins, is under death sentence following his conviction after a trial in February, 1987, for a homicide that occurred on or about January 22, 1986. Justice Ronald D. Castille, who was then District Attorney of Philadelphia County, was "the sole public official charged with the legal responsibility of conducting 'in court all criminal and other prosecutions, in the name of the Commonwealth.'" *Commonwealth v. Bauer*, 437 Pa. 37, 43, 261 A.2d 573, 576 (Pa. 1970), *quoting* 16 Pa. Cons. Stat. § 1402(a). Thus, all

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[1]Pursuant to Pa. R. App. P. 2151(b), Appellant is not filing a separate Reproduced Record with this motion, but is attaching to this motion a copy of an Order and Petition for Grant of Immunity referred to in the motion. All of the other papers referred to are in the original record, or in the partial Reproduced Record filed with Appellant's brief in chief on June 26, 1998, or appended to Appellant's Application for Remand filed on July 31, 1998.

filings made by the Commonwealth in Appellant's case, from the original information through trial and on direct appeal, were made in the name of District Attorney Castille, who also personally approved the decision to seek the death penalty in this case.

The only eyewitness to the homicide in question was Violeta Cintron, a cocaine dealer. District Attorney Castille personally petitioned for the grant of use immunity to Ms. Cintron in order to secure her testimony, and signed an affidavit to that effect. Petition for Grant of Immunity at 2-3.[2]

In opposition to the proposed summary dismissal of his PCRA petition, Appellant proffered evidence that it had been the official policy of the District Attorney's office to discriminate against African-Americans in jury selection, as evidenced in part by a training tape made at about the time of Appellant's 1987 trial that was reproduced in the name of District Attorney Castille. On appeal, Appellant has filed a pending motion seeking remand for consideration of this and other newly discovered statistical evidence showing extreme disparities in charging and sentencing during the Castille administration.

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[2]After an inquiry suggested by the trial judge, the prosecution also represented that District Attorney Castille would formally authorize a grant of use immunity to Appellant if he testified concerning an incident several days after the homicide as to which unrelated charges were pending against Appellant for aggravated assault. NTT (3/3/1987) 1477:15-1479:14; NTT (3/4/1987) 1523:14-1526:20. The aggravated-assault charges were later dismissed after witnesses gave testimony inconsistent with their testimony at Appellant's homicide trial.

II. Argument

A. Due Process Requires Justice Castille's Recusal.

The Due Process Clause requires "an impartial and disinterested tribunal in both civil and criminal cases," in order to "preserve[] both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citation omitted). Where there is anything in the record that "'would offer a possible temptation to the average man as judge . . not to hold the balance nice, clear and true between the [parties],'" due process forbids the judge's participation in the decision even if the judge in fact has no bias in the matter. *In re Murchison*, 349 U.S. 133, 136 (1955), *quoting Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *see Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (application to appellate court); *id.* at 833 (Blackmun and Marshall, JJ., concurring) (because public knows that "collegial decision making" is "the hallmark of multi-member courts," public cannot have confidence in decision in which biased judge participated).

Justice Castille has previously declined to recuse himself in a case in which his only involvement as District Attorney was to have had his name signed to *appellate* briefs, and in which there was no allegation of personal involvement or of bias or other interest on his part. *Commonwealth v. Jones*, 541 Pa. 351, 663 A.2d 142 (1995).

Here, by contrast, District Attorney Castille was personally involved, both in specifically authorizing the Commonwealth to seek the death penalty against Appellant and in personally offering immunity to a key trial witness or witnesses.[3] Unlike the situation in *Jones*, recusal on these bases would not threaten the Supreme Court's ability to hear tens or hundreds of thousands of cases with a full contingent of justices. *Id.* at 358-359, 663 A.2d at 146.

Moreover, Appellant's allegations concerning systemic racial and other bias during District Attorney Castille's administration create, or will at least be perceived to create, an interest on Justice Castille's part in the outcome of this case, whether or not Justice Castille himself is personally biased. *See id.* at 356, 663 A.2d at 145 (proponent of recusal must "allege facts tending to show bias, interest or other disqualifying events"). In other words, Justice Castille should recognize that he has at least a "temptation," *see In re Murchison*, to avoid a ruling overturning a death sentence he sought and successfully defended on direct appeal, in part on the basis that his administration

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[3]Appellant also contends that due process and the Code of Judicial Conduct require recusal because District Attorney Castille was the named lead attorney representing the Commonwealth and was thus directly responsible for Appellant's prosecution and the opposition to his appeal. *See, e.g., Laird v. Tatum*, 409 U.S. 824, 828 (1972) (Rehnquist, J.) (recusal would be required of justice who appeared "of counsel" in case); *Commonwealth v. Parrish*, 378 A.2d 884, 886 (Pa. Super. 1977) ("the appearance of judicial integrity and neutrality mandates that a judge who has represented a party in a proceeding remove himself from further participation in that case"). In any event, this is not a case of nominal involvement. *Cf. Commonwealth v. Jones.*

systematically discriminated against African-Americans in seeking the death penalty and empaneling juries in capital cases, including Appellant's. Deliberations in a *capital* case involving a Justice who may have outside-the-record knowledge of the case, or of the specific practices of his office while he served as District Attorney, may lead to the public perception that the case has been decided based upon information that Appellant had no opportunity to rebut or explain. *See Gardner v. Florida*, 430 U.S. 349 (1977).

The Pennsylvania and United States Constitutions require recusal in these circumstances.

B. The Code of Judicial Conduct Requires Justice Castille's Recusal.

The Code of Judicial Conduct provides:

> A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it[.]

Code of Judicial Conduct, Canon 3(C)(1). These standards may, of course, require recusal even where the Constitution would not.

Justice Castille would appear likely to have "personal knowledge of disputed evidentiary facts concerning the proceeding." Canon 3(C)(1)(a). This is certainly true concerning whether the "training tape" made in his name was the policy of his office and whether his office was conscious that its policies would result in dramatically disparate sentences by race, such that a statistical expert has concluded that being African-American is a strong "aggravating factor" in Philadelphia, albeit a nonstatutory one. *See* pending Motion to Remand. It may also be true concerning the decisions to offer use immunity and other reasons the District Attorney sought the death penalty in this case, whether or not presented to the jury and the courts. Justice Castille's participation in this matter would not be proper.

Justice Castille also "served as lawyer in the matter in controversy." Canon 3(C)(1)(b). Indeed, he served as lead named attorney in prior proceedings in this matter. Moreover, the Commonwealth's trial attorney, George Shotzbarger, is "a lawyer with whom [Justice Castille] previously practiced law" who "served during such association as a lawyer concerning the matter." Canon 3(C)(1)(b). Although "[a] lawyer employed by a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection," Comment to Canon 3(C)(1)(b), Justice Castille was not merely another lawyer in the same department; he was Mr. Shotzbarger's direct superior.

Commonwealth v. Jones, supra, appears to assert Justice Castille's prerogative not to recuse himself on the sole alleged ground that he was the prosecutor's superior. However, both Mr. Shotzbarger and Jack McMahon, who reported directly to District Attorney Castille at the time, will be material witnesses concerning the matter if this Court reverses Judge Sabo's denial of PCRA relief without a hearing, *or* if the Court grants the Motion to Remand. Therefore, Justice Castille should disqualify himself, because "his impartiality might reasonably be questioned because of such association." Comment to Canon 3(C)(1)(b).

Canon 3 has been held to require the recusal of a judge who previously served as an assistant district attorney in a case, without recourse to a harmless-error analysis, even where the defendant had initially waived objections to the judge's participation in the case. *Turner v. State*, 114 Nev. 78, 1998 WL 400373 (July 16, 1998). The perception of fairness requires no less here, as do state and federal due-process guarantees.

III. Conclusion

For all of the foregoing reasons, Appellant, Saharris Rollins, respectfully requests that Justice Castille decline to participate in the consideration or decision of this case or of the pending Motion for Remand.

Respectfully Submitted,

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Dated: October 13, 1998.

* * * *

[Attachments Omitted: Order and Petition for Grant of Immunity for Violeta Cintron]

* * * *

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of the foregoing pleading to be served upon the persons and in the manner indicated below:

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No. 15-5040

Supreme Court, U.S.
FILED
FEB 12 2016
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

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ARGUMENT

I. Chief Justice Castille's Refusal to Recuse Himself from the Review of the Commonwealth's Appeal Violated Due Process and the Eighth Amendment

When a prosecutor has made an individualized, discretionary decision that the circumstances of a criminal charge and the character of the defendant call for a death sentence, the prosecutor cannot constitutionally preside as a judge on appeal from a ruling that the prosecution engaged in misconduct as a means of securing the death sentence. The Commonwealth cites no case "comparable to the circumstances in this case," *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 887 (2009), and the national consensus in fact mandates recusal in far less glaring circumstances. When "all the circumstances of this case" are weighed objectively, *Id.* at 872, due process requires recusal.

A. Chief Justice Castille Served as Prosecutor and Judge in Petitioner's Case

The Commonwealth characterizes then-District Attorney Castille's decision to seek the death penalty against Mr. Williams as "administrative," Br. for Resp't i, 17, 20, 21, suggesting it was routine or ministerial:[1]

> It was *office policy* that the district attorney *put his signature* on *all such memos*; he

1. *See Black's Law Dictionary* (10th ed. 2014) (defining "administrative" as "[o]f, relating to, or involving the work of managing a company or organization").

> signed scores of them, along with all the other *managerial tasks* of running one of the nation's largest prosecution offices.

Id. at 17 (emphasis added); *see also id.* at 21 ("[T]he memos were passed up the chain of command for the district attorney's signature to indicate official concurrence."); *id.* at 26 ("his signature was an expression of that general policy" in support of capital punishment). The Commonwealth offers no record citations to support its description of the capital charging process in this case.

The Commonwealth's description echoes Chief Justice Castille's opinion declining to recuse himself in *Commonwealth v. Rainey*, 912 A.2d 755 (Pa. 2006). Yet the Commonwealth does not explain the disjuncture between the decisionmaking process reflected in the death authorization memorandum submitted to District Attorney Castille in this case and the purported decisionmaking procedure described in *Rainey* under which his "formal approval . . . simply represented a concurrence in . . . [his subordinates'] judgment that the death penalty statute applied, *i.e.*, that one or more of the statutory aggravating circumstances set forth in the Sentencing Code . . . existed, and nothing more." *Id.* at 758.

The death authorization memorandum belies the assertion that the Chief Justice played no substantial role in this case or that his review was limited to determining whether there was any evidence of a statutory aggravating circumstance. The memorandum shows that, while his subordinates recommended a capital prosecution, District Attorney Castille decided that the crime and Mr. Williams' background warranted a death sentence.

The memorandum provided District Attorney Castille with a wide range of information about the homicide and Mr. Williams' background. It set out detailed features of the homicide that went well beyond Pennsylvania's statutory aggravating circumstances and discussed unrelated robbery charges that would be inadmissible at a capital sentencing. More importantly, the memorandum described potentially mitigating evidence such as his youth, education, and athletic achievements – factors that would all be irrelevant under the procedure described in *Rainey*. The memorandum even referred to witnesses who described Mr. Williams as having "a Jeckyl-Hyde [sic] personality." JA 424a-26a; *see* Br. for Pet'r 4-5. The only plausible reason for including such information in the memorandum was because it was relevant to District Attorney Castille's decision to pursue a death sentence.

The notion that deciding to seek a person's execution is a mere administrative formality is troubling at best. But even assuming that District Attorney Castille's capital charging decision was nothing more than "an expression of . . . general policy" and an "official concurrence," Br. for Resp't 21, 26, this Court has long recognized that an "'official motive'" can be among the "interests that tempt adjudicators to disregard neutrality." *Caperton*, 556 U.S. at 878 (quoting *Tumey v. Ohio*, 273 U.S. 510, 535 (1927)). An adjudicator may have a disqualifying interest "both as an individual and as chief executive," *Tumey*, 273 U.S. at 535, and "executive responsibilities" alone can undermine judicial impartiality, *Ward v. Monroeville*, 409 U.S. 57, 60 (1972). Under Pennsylvania law, District Attorney Castille was responsible for making, and actually made, the life-or-death charging decision in this case. *See* Br. for Pet'r 25 (citing cases). Given the magnitude of this decision,

his "official motive" and "executive responsibilities" as District Attorney disqualified him from participating in the same case as a judge.

The Commonwealth argues that any probability of bias diminished to a constitutionally tolerable level on account of the passage of time. *See* Br. for Resp't 20-26, 29. Recusal obligations, however, have never been understood to have an end date when the judge's conflicting roles arise *in the same case. See Caperton*, 556 U.S. at 880 (discussing *In re Murchison*, 349 U.S. 133 (1955): "This Court set aside the convictions on grounds that the judge had a conflict of interest at the trial stage *because of his earlier participation* followed by his decision to charge them." (emphasis added)); *Murchison*, 349 U.S. at 137 ("Having been a part of th[e accusatory] process a judge cannot be, *in the very nature of things*, wholly disinterested in the conviction or acquittal of those accused." (emphasis added)). At least forty-nine states and the federal government thus establish lifetime bans on a lawyer or judge undertaking conflicting roles in the same case. *See* Model Code of Jud. Conduct Rule 2.11(A)(6); Model Rules of Prof'l Conduct Rule 1.11; Pa. Code of Jud. Conduct Rule 2.11(A)(6); Pa. Rules of Prof'l Conduct Rule 1.11; *see generally* Br. of Amici Curiae Ethics Bureau at Yale 2-4 & n.2. No authority limits to a particular time frame the rule that "no man can be a judge in his own case." *Murchison*, 349 U.S. at 136.

The Commonwealth repeatedly asserts that Chief Justice Castille voted in favor of the October 3, 2012, per curiam order denying the Commonwealth's application to lift the stay of Mr. Williams' execution and thus that he could not have been biased. *See* Br. for Resp't 22-23

n.5, 25, 57, 58, 62. The per curiam order denying the application to lift the stay does not identify the votes of the individual justices. According to the rules of the Pennsylvania Supreme Court, dissenting votes to a per curiam order need not be identified. *See* Pa. Sup. Ct. Internal Operating Procedures § 3.C.4. Thus, the record does not reflect how Chief Justice Castille voted, and no inference of impartiality can be drawn. *See* JA 169a. In any event, just as judicial rulings against a defendant do not suggest bias, *Liteky v. United States*, 510 U.S. 540, 555 (1994), acquiescence in a ruling in a defendant's favor – particularly a ruling that more time is needed to review the case – does not preclude bias.

B. Petitioner Sought Recusal Based on New Evidence of Chief Justice Castille's Role in the Decision to Seek the Death Sentence

The Commonwealth contends that the absence of prior recusal motions demonstrates Petitioner's "own assessment of no probable bias." Br. for Resp't at 36, 37. The Commonwealth further argues that Petitioner's recusal motion here must have been "[t]actical," because, as Petitioner was the prevailing party below, an equally divided Pennsylvania Supreme Court would have affirmed the lower court's grant of relief. *Id.* at 39, 40. The Commonwealth is wrong on each count.

The memorandum demonstrating then-District Attorney Castille's personal, discretionary decision to seek the death penalty against Petitioner was first disclosed in September 2012, just weeks before the recusal motion in this case. Likewise, the extensive evidence suppressed by the Commonwealth was first disclosed in

September 2012, and this evidence formed the basis of the lower court's ruling that Petitioner's death sentence was secured through prosecutorial misconduct and deceit. JA 85a-89a. These dispositive circumstances, upon which Petitioner based his recusal motion, were not present in prior proceedings. *See* Br. for Pet'r 14-17.

Likewise unavailing is the Commonwealth's contention that Petitioner's recusal motion was a tactical effort to obtain an affirmance from an equally divided court. *See* Br. for Resp't 39-40. Although the Pennsylvania Supreme Court is a seven-member court, at the time the recusal motion was filed and at the time the decision was issued in this case, there were only six justices on the court. *See* JA 16a, 36a. Chief Justice Castille's recusal would have eliminated, not invited, the possibility of an equally divided court.

C. This Court's Recusal Decisions Warrant Chief Justice Castille's Disqualification

The Commonwealth posits that this Court's due process cases require recusal in only two categories of cases – where the judge has some financial interest and where "the judge simultaneously acted in two conflicting roles." Br. for Resp't at 41-42. But this Court has rejected such bright-line rules, holding that due process addresses the "interests that tempt adjudicators to disregard neutrality" and recognizing that the "'degree or kind of interest [] sufficient to disqualify a judge from sitting "cannot be defined with precision."'" *Caperton*, 556 U.S. at 878-79 (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986), in turn, quoting *Murchison*, 349 U.S. at 136). Due process is not confined to specific categories;

rather, it requires consideration of "all the circumstances of this case." *Caperton*, 556 U.S at 872.

The Commonwealth also asserts that Chief Justice Castille's refusal to recuse is consistent with the historical practice of several Justices of this Court. Br. for Resp't 42-45. None of the examples it provides involved a Justice who had participated, or had taken an adversarial role, in the same case as the one pending before the Court.

Former Chief Justice Rehnquist's opinion in *Laird v. Tatum*, 409 U.S. 824 (1972), is instructive. After noting that he "did not have even an advisory role in the conduct of the case," then-Justice Rehnquist distinguished *Laird* from those cases where he had recused himself because of even a limited role in the case. *Id.* at 828-29 (citing *United States v. U.S. Dist. Court*, 407 U.S. 297 (1972), where he assisted in drafting a brief, and *S & E Contractors v. United States*, 406 U.S. 1 (1972), where he had an advisory role that terminated prior to the start of litigation).

In a similar vein, Justice Marshall observed in a memorandum to his fellow Justices regarding his recusal practice in NAACP cases:

> For at least a time after leaving the organization, I deemed it proper not to participate in any NAACP matters before the Court, both to quell any appearance of impropriety and to *assure, prophylactically, that I did not decide cases involving issues that were in the office while I was there.*

Justice Thurgood Marshall, Memorandum to the Conference, Oct. 4, 1984, at 1, *in* Papers of Henry A. Blackmun, Library of Congress, Manuscript Division, box 1405, folder 14. Justice Jackson likewise heeded this principle in *Hirota v. General of the Army MacArthur*, 335 U.S. 876 (1948). Although he had recused himself from cases involving war crimes trials in Germany because of his participation in those trials, he did not recuse in cases involving war crimes trials in Japan, where he had not participated. *Id.* at 876-81. Just as Chief Justice Castille's refusal to recuse in this case lies far beyond the bounds of judicial ethics – *see* Br. for Pet'r 32-35; Br. of Amicus Curiae the ABA 7-26; Br. for Amici Curiae Former Judges with Prosecutorial Experience 11-26 – it is likewise foreign to this Court's practices.

II. Due Process and the Eighth Amendment Require Relief from the Decision of a Tribunal that Included a Biased Jurist

The Commonwealth does not argue that public confidence in a judicial decision can be maintained where a biased judge unconstitutionally participated in the decisionmaking; nor does it dispute that the overwhelming majority of state and federal courts find that the presence of a biased judge undermines the tribunal's private, collective deliberative process and thus requires reversal even though the precise effect cannot be ascertained. Instead, the Commonwealth raises three arguments that do not withstand scrutiny.

A. This Case Should Be Remanded for *De Novo* Consideration Without the Participation of Chief Justice Castille

The Commonwealth contends that, in having his reargument application denied below, "Petitioner has already received the relief he now requests." Br. for Resp't 48. The Commonwealth waived this argument by not raising it in its brief in opposition to certiorari. *See* Sup. Ct. R. 15.2; *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 306 (2010).

Even if not deemed waived, the Commonwealth's argument is meritless. Petitioner seeks *de novo* review of his appeal by the Pennsylvania Supreme Court, without Chief Justice Castille's participation.[2] Br. for Pet'r 19, 38, 51. Petitioner's reargument petition, which was filed before Chief Justice Castille's retirement and decided after his retirement, was subject to a far more onerous standard. Pa. R. App. P. 2543 (reargument "is not a matter of right" and will be allowed only on a showing of "compelling reasons"). Moreover, reargument is a discretionary remedy; the *denial* of Petitioner's request for reargument indicated that the court did *not* reconsider the matter on the merits. *Cf.* Pa. R. App. P. 2546(b) (where reargument is *granted* the court may, *inter alia*, "restore the matter to the calendar for reargument" or "specify the issue or issues which will be considered by the court"); *Freed v.*

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2. The equivalent relief followed this Court's decisions in prior due process recusal cases. *See, e.g.*, *Ward*, 409 U.S. at 61-62; *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971); *Nationwide Mut. Ins. Co. v. Clay*, 525 So. 2d 1339, 1340-41 (Ala. 1987) (following remand in *Lavoie*); *Caperton v. A.T. Massey Coal Co., Inc.*, 690 S.E.2d 322, 333-34 (W. Va. 2009) (following remand in *Caperton*).

Geisinger Med. Ctr., 979 A.2d 846, 846 (Pa. 2009) (granting reargument and directing the parties to file supplemental briefs and present oral argument on specified issues). In Pennsylvania as elsewhere, reargument is a disfavored and seldom-granted remedy. The denial of reargument is no substitute for *de novo* review.

The Commonwealth also posits that *de novo* review would be effectively moot because "all Pennsylvania capital sentences have been suspended by a gubernatorial moratorium." Br. for Resp't 52; *see id.* at 54 (citing *Commonwealth v. Terrance Williams*, No. 14 EM 2015, 2015 WL 9284095 (Pa. Dec. 21, 2015)). In that decision, however, the court ruled that because "Williams remains on death row under sentence of death[,] . . . we disagree with the Commonwealth's suggestion that the reprieve unconstitutionally altered a final judgment of this Court; rather, the execution of the judgment is merely delayed." *Williams*, 2015 WL 9284095, at *15. In other words, although executions have been postponed, Mr. Williams' sentence of death remains in force. The Pennsylvania Supreme Court thus continues to adjudicate the validity of capital sentences during the moratorium. *See, e.g.*, *Commonwealth v. Poplawski*, No. 654 CAP, 2015 WL 9485200 (Pa. Dec. 29, 2015). Mr. Williams can obtain *de novo* consideration of this appeal in the Pennsylvania Supreme Court if this Court grants relief.[3]

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3. Petitioner has completed litigation of his federal habeas proceedings; there are no proceedings pending in federal court. The Commonwealth's discussion of two unrelated federal habeas cases held in abeyance, *see* Br. for Resp't 52-54, is therefore irrelevant.

B. Petitioner Sought the Entire Pennsylvania Supreme Court's Review of the Recusal Motion

The Commonwealth next argues that "petitioner was not entitled to disqualify all the remaining justices without first seeking their review of the recusal issue." Br. for Resp't 55. Petitioner, however, does not contend that any Justice other than the Chief Justice should be disqualified, and he was not required by Pennsylvania law or practice to ask the full Pennsylvania Supreme Court to review Chief Justice Castille's denial of the motion to recuse. Nevertheless, he did request such review.

Petitioner has argued that the decision below is not amenable to harmless-error analysis because of the private and collective nature of appellate adjudication and that public confidence in the courts does not extend to tribunal decisions in which a biased judge participated. Br. for Pet'r 35-41. The Commonwealth recasts Petitioner's arguments as a demand "to disqualify all the remaining justices" as biased, and the Commonwealth concludes that Petitioner waived such relief because he did not ask all of the Pennsylvania Supreme Court justices to rule on the recusal motion. Br. for Resp't 55-58. This is a mischaracterization of Petitioner's argument. Petitioner does *not* contend that the other justices are biased, as the Commonwealth elsewhere recognizes. *See* Br. for Resp't 51. Rather, he contends that the participation of a biased jurist requires a *de novo* review of the appeal without the participation of that jurist.

Petitioner was not required to seek the full court's review of the recusal motion, and the Commonwealth cites no authority suggesting otherwise. *See* Br. for Resp't

55-58. The Pennsylvania Supreme Court has rejected procedures that require recusal motions to be considered by judges other than the one whose recusal is sought. *See Reilly by Reilly v. Se. Pa. Transp. Auth.*, 489 A.2d 1291, 1298, 1300 (Pa. 1985) ("[I]t is the duty of the judge to decide whether he feels he can hear and dispose of the case fairly and without prejudice . . . . Once this decision is made, it is final and the cause must proceed."); *see also* 8 *Standard Pennsylvania Practice* § 48:22 (2d ed. 2015) ("The proper practice on a plea of prejudice requesting recusal of a judge is to address an application by petition to the judge before whom the proceedings are being tried.").

Although some Pennsylvania Chief Justices have referred recusal motions to the full court, there is no requirement that such a referral be requested, as under Pennsylvania law a recusal motion to an individual jurist preserves the issue "as any other assignment of error." *Reilly*, 489 A.2d at 1300. Where state law deems the issue preserved, this Court properly addresses it. *Cnty. Court v. Allen*, 442 U.S. 140, 154 (1979).

In any event, in order to provide every opportunity to correct Chief Justice Castille's refusal to recuse, Petitioner did seek full court review of the recusal motion. In the Pennsylvania Supreme Court, "[a]ll motions, petitions and applications will be assigned to the Chief Justice, except for . . . motions addressed to a single Justice." Pa. Sup. Ct. Internal Operating Procedures § 7.B. Before his elevation to Chief Justice, Justice Castille therefore adjudicated individual motions for his recusal, while the Chief Justice handled motions to the full court for Justice Castille's recusal. The Commonwealth recounts two instances where prior Chief Justices referred such motions to the full court. *See* Br. for Resp't 56-57 (citing *Commonwealth v.*

Rollins and *Commonwealth v. Rainey*). After becoming Chief Justice in 2008, however, both individual motions and court motions for Chief Justice Castille's recusal were assigned to him pursuant to § 7.B. In *Commonwealth v. Porter*, for example, Chief Justice Castille denied Porter's request that the recusal motion be referred to the full court, stating: "Even if there were some basis for the request, I would not burden the Court with this sort of pleading." *Commonwealth v. Porter*, 35 A.3d 4, 34 (Pa. 2012) (Castille, C.J., denying motion for recusal). In this case, when Petitioner sought recusal and asked that the full court consider the motion, Chief Justice Castille again refused to refer the motion to the court. JA 171a. Chief Justice Castille – not Petitioner – prevented the full court from considering the recusal motion.

C. The Participation of a Biased Judge on an Appellate Court Requires Relief

The Commonwealth again recasts Petitioner's request for relief as a "'total disqualification' rule" in which "the presence of a non-recused judge has 'infected' all other members of the court." Br. for Resp't 58, 60 (citing Br. for Pet'r 38). According to the Commonwealth, this rule would "sidestep the standard set by the Court in *Caperton*: whether the decision below was the product of 'a constitutionally intolerable probability of [actual] bias.'" Br. for Resp't 58 (quoting *Caperton*, 556 U.S. at 882).

Caperton is fully consistent with the majority rule that an appellate tribunal may not include a biased judge, regardless of whether the judge casts a decisive vote. *Caperton* recognized "[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one." *Id.* at 883. Those difficulties would only

be compounded by inquiring into the actual influence one justice had on other justices – an inquiry that the Commonwealth's argument necessarily invites. Because, in assessing a judge's *duty* to recuse, "the Due Process Clause has been implemented by objective standards that do not require proof of actual bias," *id.*, it would be incongruous and unworkable to cast aside those objective standards in assessing the *harm* from a failure to recuse.

Finally, the Commonwealth contends that granting *de novo* review would conflict with the practice of some courts, in which, when a judge "recuses only after he has devoted substantial time to the case, . . . the remaining members of the panel proceed to a decision." Br. for Resp't 61. Aside from the obvious distinction that Chief Justice Castille refused to recuse at the outset of this appeal, the decisions cited by the Commonwealth do not indicate whether the recused judges participated in any deliberations or, if so, whether the remaining judges began their deliberations anew after the recusal. *See id.* at 61 n.41 (citing cases).[4]

In fact, the predominant judicial practice – both in this Court and in other courts – is to recommence deliberations anew after a belated recusal. In *Credit Suisse Securities (USA) LLC v. Billing*, 549 U.S. 1277 (2007), for example,

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4. Nor do any of the cited cases involve due process. Rather, the recusals appear to be based on technical statutory requirements that were initially overlooked. *See, e.g., Whitehall Tenants Corp. v. Whitehall Realty Co.*, 136 F.3d 230, 233 (2d Cir. 1998) (cited in Br. for Resp't at 61 n.41) ("[T]he remote circumstance that persuaded Judge Calabresi to recuse himself in an abundance of caution had not occurred to him until after the conclusion of oral argument, and the circumstance involved no interest – pecuniary or otherwise – in the outcome of the litigation.").

Justice Kennedy recused himself after the Court granted certiorari. The Court withdrew its order, reconsidered the petition without Justice Kennedy's participation, and granted certiorari again. The Court followed the same procedure in *Laboratory Corp. of America Holdings v. Metabolite Laboratories, Inc.*, 546 U.S. 999 (2005).[5] Petitioner's request for a remand for *de novo* review is fully consistent with judicial practice in cases where a judge has actually recused herself.

Due process cannot be satisfied by a rule that requires only a majority of appellate judges to be unbiased or that allows all but one member of a court to be free from bias. The essence of due process requires that every member of the court be free from bias.

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5. *See also Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 848 n.* (7th Cir. 2000) ("Circuit Judge Kanne recused himself and did not participate in the consideration or decision of this case, which is being decided by quorum of the panel."); *Schering Corp. v. Pfizer Inc.*, 189 F.3d 218, 221 n.* (2d Cir. 1999) (Sotomayor, J.) ("The third judge on the panel originally designated to hear this matter, the Honorable Fred I. Parker, recused himself from the case after oral argument and did not participate in any aspect of the court's consideration of this matter."); *Tadlock Painting Co. v. Md. Cas. Co.*, 97 F.3d 1449, 1449 n.* (4th Cir. 1996) ("Judge Wilkins heard oral argument in this case but recused himself after certification to the Supreme Court of South Carolina and did not participate in the consideration of this appeal."); *Murray v. Nat'l Broad. Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (stating that the recused judge "has not participated in the adjudication of the appeal"); *State v. Tenay*, 114 A.3d 931, 933 n.** (Conn. 2015) ("Following reargument en banc, Judge Alvord recused herself and did not participate in the consideration or decision of the case.").

CONCLUSION

For the reasons stated above and in Petitioner's Brief, the judgment of the Pennsylvania Supreme Court should be vacated and the case remanded for the Pennsylvania Supreme Court to conduct *de novo* review without the participation of Chief Justice Castille.

Respectfully submitted,

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Dated: February 12, 2016

No. 15-5040

In The Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Pennsylvania, Eastern District

BRIEF OF AMICUS CURIAE ON BEHALF OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS IN SUPPORT OF PETITIONER

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BRIEF OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS, AMICUS CURIAE, SUPPORTING PETITIONER

The American Academy of Appellate Lawyers submits this brief as amicus curiae in support of petitioners.[1]

INTEREST OF THE AMICUS CURIAE

The American Academy of Appellate Lawyers (the "Academy") is a non-profit, national professional association of lawyers skilled and experienced in appellate practice and related post-trial activity in state and federal courts, dedicated to the enhancement of the standards of appellate practice and the administration of justice, and to the ethics of the profession as they relate to appellate practice. Membership in the Academy is by nomination or invitation only, and the Academy currently has 295 active

[1] The parties to the action have consented in writing to the filing of amicus briefs pursuant to Rule 37.3(a) of the Rules of this Court. The parties' letters of consent have been filed with the Clerk of the Court.

Pursuant to Supreme Court Rule 37.6, the Academy states that this brief was written by Fellows of the Academy, and was produced and funded exclusively by the Academy or its counsel. No party or counsel for a party was involved in preparing this brief or made a monetary contribution intended to fund the preparation or submission. Some of the Fellows of the Academy are active or former judicial officers. No active judicial officer has participated in the decision to file this brief or in its preparation.

member "Fellows." The activities of the Academy are supported entirely by the dues, program fees and initiation fees paid by the Fellows.

By publishing newsletters and reports, conducting retreats and conferences, teaching appellate courses and seminars, and establishing a network of appellate practitioners and scholars, the Academy brings together the leading attorneys in the nation who devote their practices and teaching to appellate decisionmaking and the administration of justice on appeal. The Academy has submitted its views to Congress on legislative changes affecting appellate practice and has helped organize, chair and administer a national conference on the functioning of the appellate courts. In pursuit of its mission, the Academy has submitted comments and testified to the Advisory Committee on Rules of Appellate Procedure, and has previously filed amicus curiae briefs in this Court.[2]

The Fellows of the Academy offer comprehensive knowledge of the roles of state and federal appellate courts and the leadership role of those courts in the development of American law. In 2010, after extensive investigation, the Academy promulgated

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[2] Brief of the American Academy of Appellate Lawyers Amicus Curiae Supporting Petition for a Writ of Certiorari, *Mountain Enterprises, Inc. v. Fitch*, 541 U.S. 989 (2004) (No. 03-1222)

Brief of the American Academy of Appellate Lawyers, Amicus Curiae, Supporting Petitioners, *Caperton v. A.T. Massey Coal Company, Inc.*, 556 U.S. 868 (2009)

and published eight "Principles of State Appellate Judicial Disqualification," *http://appellateacademy.org/publications/policies/recusal_standards.pdf* ("*Principles*"). These *Principles* reflect the Academy's collective views on the best practices that should be used in resolving judicial recusal issues.

The Academy is filing this amicus brief because its Fellows believe that public respect for the fairness, impartiality and objectivity of appellate courts is essential to the performance of their roles. Both objectivity and the public perception of objectivity are essential to maintaining public respect for the courts and preserving the integrity of our system of appellate justice.

SUMMARY OF ARGUMENT

When a sitting judge has previously played a direct role in prosecuting a criminal defendant, the judge's subsequent participation in review of the defendant's conviction and sentence violates the defendant's right to due process of law, creates the appearance of impropriety and very likely presents an improper conflict of interest. This circumstance thus impairs the public perception of the courts and violates the defendant's right to due process of law. These concerns are magnified when the judge is a former prosecutor who founded his judicial campaign on having "sent 45 people to death row," one of whom is the defendant now before the judge, and where the

very conduct of the District Attorney's office he headed is under review.

"[T]he source of judicial authority lies ultimately in the faith of the people that a fair hearing may be had." *Haluck v. Ricoh Electronics, Inc.*, 151 Cal.App.4th 994, 1008, 60 Cal.Rptr.3d 542 (Cal.App. 2007) (internal quotation marks omitted). Because bias or perceived bias influences the public's perception of the judicial system as well as the case of an individual defendant, due process and proper respect for appellate decisionmaking requires reversal of rulings in which such a judge has taken part, regardless whether the judge has cast the decisive vote.

ARGUMENT

Judges wear robes not merely out of tradition, but to signal that whatever their individual views, they act as objective neutrals, not as partisans, when they serve the law. Unless corrected, the denial of petitioner's recusal motion, the refusal to refer the recusal motion to the full court, and the outcome of the post-conviction proceedings will undermine respect for the process of judicial review and for the rule of law itself.

"The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government." *Williams-Yulee v. Florida Bar*, 135 S.Ct. 1656, 1666 (2015). Its authority "depends in large measure on the public's willingness to

respect and follow its decisions," *id.*, and that means "that public perception of judicial integrity is a 'state interest of the highest order.'" *Id.*, *quoting Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009).

This Court has previously identified circumstances in which a judge's interest in the outcome of a case should disqualify that judge from participation. One is where sitting on the case "would offer a possible temptation to the average . . . judge to . lead him not to hold the balance nice, clear and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Another occurs when an attack on a judge's character or actions is such that an average judge in that position is not "likely" to be neutral. *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). And the third circumstance, the focus of *Caperton*, is a judicial election where a litigant with a personal stake in the outcome of a case makes a significant contribution to a reviewing judge's election campaign. The Court required that the possibility of bias be measured objectively, based on the likely effect on an "average judge."

I. Due Process Precludes Involvement by a Judge Who Participated in the Decision Under Review

Judicial neutrality lies at the heart of due process of law. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Williams-Yulee*, *supra*, 135

S.Ct. at 1674 (Ginsburg, J., concurring), quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

There are no circumstances in which a former executive branch officer who subsequently becomes a judge can "hold the balance nice, clear and true" (*Tumey*, *supra*, 273 U.S. at 532) in reviewing an action he or she took on behalf of the executive branch. It does not matter whether the case before the court is a death penalty case, or even a criminal case; it does not matter whether the judge was a prosecutor, or the chair of a federal commission, or the special assistant to a state's governor. The essence of judicial review is fair and unbiased review by neutral decisionmakers. When a judge undertakes to review an action that he or she took as an executive branch official, there is at least an appearance of bias, and a serious risk of actual bias.

Asking a person to sit neutrally in judgment of his or her own past performance calls for the impossible. "People believe they are objective, see themselves as more ethical and fair than others, and experience a 'bias blind spot,' the tendency to see bias in others but not in themselves." Jennifer K. Robbenolt and Matthew Taksin, *Can Judges Determine Their Own Impartiality?*, 41 American Psychological Association Judicial Notebook No. 2 (2010), p. 24, internal citations omitted.[3] We tend to evaluate

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[3] http://www.apa.org/monitor/2010/02/jn.aspx, accessed December 2, 2015.

our own views favorably: "[w]e use introspection to acquit ourselves of accusations of bias, while using realistic notions of human behavior to identify bias in others." Richard A. Posner, *How Judges Think* (Harvard University Press, 2008), p. 121.

Here, the appellate justice's involvement in the underlying case went well beyond the personal – handwritten – approval of the decision to seek the death penalty. JA 426a. As the District Attorney, he was responsible for a prosecutor's office found to have: "intentionally rooted out information" favorable to the defense from pretrial disclosures, JA 152a; "sanitized" evidence, JA 101a; coerced a witness to testify favorably to the prosecution, JA 70a n. 14; presented false evidence, JA 152a-153a, 155a, 159a; and made false representations in earlier post-conviction proceedings, JA 86a-89a. He then won his judicial position on the basis of having "sent 45 people" – including petitioner – "to death row."

Given his position of oversight and his ensuing "tough on crime" campaign, there is no basis on which the appellate justice's eventual role in the decision can be described – objectively – as unbiased or neutral. And (to state the obvious) this is notwithstanding the justice's integrity as an individual or as a judge.

There is little doubt that the appellate justice believed he could fairly adjudge petitioner's case. But that is not the test, nor should individual belief play a role in the analysis. The appearance of neutrality and objectivity is a systemic issue that must be considered

from a systemic perspective. Every litigant is entitled to "review on the merits by judges whose impartiality cannot reasonably be questioned." *Principles*, p. 1. "A 'fair trial in a fair tribunal is a basic requirement of due process.'" *In re Murchison*, 349 U.S. 133, 136 (1955). Therefore, the Court should categorically foreclose a judge from reviewing a determination he or she was responsible for as head of an executive department.

II. Recusal of a Potentially Biased Judge Is Essential to Maintaining an Effective Legal System and Preserving Respect for Law

"[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'" *Murchison*, *supra*, 349 U.S. at 136, quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954). The appearance of bias, let alone actual bias, causes the public to lose respect for and confidence in the judicial system. *Principles*, p. 2. Appellate courts, and especially supreme courts, should lead by setting a high standard for probity. In this case, where the appellate justice's leadership of the District Attorney's office is called into question, his participation as a judicial officer in that review has the opposite effect.

The spectacle of a prejudiced or possibly prejudiced judge sitting in judgment upon the rights of litigants throws courts and the administration of justice into disrespect. The resulting lack of confidence in the integrity of courts "'rocks the very foundations

of organized society, promotes unrest and dissatisfaction, and even encourages revolution.'" *State v. Allen*, 778 N.W.2d 863, 878 (Wis. 2010), quoting *In re Hon. Charles E. Kading*, 235 N.W.2d 409 (Wis. 1975).

Moreover, if the bias of an appellate decisionmaker affects his or her reasoning about an appeal, "then the taint of that biased decision extends to every future litigant whose case may be affected by the appellate decision under the principle of stare decisis." *Principles*, p. 2. "Appellate opinions 'collectively form the body of the common law' and 'govern what a trial judge does, even if no appeal is ever taken in a particular case. . . .'" *Id.*, quoting Daniel J. Meador, Maurice Rosenberg and Paul D. Carrington, *Appellate Courts: Structures, Functions, Processes, and Personnel* xxxi-xxxii (Michie 1994). "Decisions of appellate courts also guide the advice lawyers give their clients, the actions clients take based on that advice, even the content of legal forms people use. The text of the opinion deciding a case may have as much effect on future litigants and on others who depend on the state of the law as it does for the immediate parties to a case." *Principles*, pp. 2-3.

"Correcting trial court error is another important role played by appellate courts. For more than two centuries, the American people have made provision for appellate courts in their state constitutions, to elevate fairness and equal application of justice over the risks of local bias and the fallibility of trial judges acting alone. . . Appellate oversight of trial courts brings consistency to the legal system as a whole.

That oversight must be exercised without bias." *Principles*, p. 3.

The adverse systemic consequences of not requiring recusal in this instance are apparent. There are no countervailing interests that outweigh the concerns raised by the failure to recuse. The Academy's published *Principles* identify tools to preserve the integrity of decisionmakers, such as referring the recusal issue to other judges, or providing for review of the recusal determination. Where those tools are not used, and principles of due process are transgressed, this Court should insist on a higher standard.

III. The Collegial Nature of Appellate Decisionmaking Prohibits Participation of a Biased Judge Whether the Court Is Divided or Unanimous

"[W]hile the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986) (Brennan, J., concurring). Therefore the participation of a biased, or potentially biased, member of an appellate panel requires reversal of a decision regardless of whether that justice cast the deciding vote. "'The different perceptions, premises, logic, and values of *three or more* judges ensure a better judgment. In these differences and in the process of criticism, response, and resolution lies the virtue of

the appellate process.'" *Moles v. Regents of University of California*, 654 P.2d 740, 744 (Cal. 1982), emphasis in original, quoting Frank M. Coffin, *The Ways of a Judge* (1980) at p. 174.

> Our experience should tell us that the concessions extracted as the price of joining an opinion may influence its shape as decisively as the sentiments of its nominal author. To discern a constitutionally significant difference between the author of an opinion and the other judges who participated in a case ignores the possibility that the collegial decisionmaking process that is the hallmark of multimember courts led the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity.

Lavoie, supra, 475 U.S. at 832-833 (Blackmun, J., concurring).

As these authorities attest, the appellate judge's participation here tainted the entire process in a manner that due process will not tolerate. Collective decisionmaking, the hallmark of the appellate process, should not be sacrificed to a "no harm, no foul" rationalization.

CONCLUSION

To preserve the interests of justice, the Court should reverse the decision of the Pennsylvania Supreme Court and remand the case.

Respectfully submitted,

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Dated: December 7, 2015

No. 15-5040

IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF PENNSYLVANIA

BRIEF OF *AMICUS CURIAE* THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether the Eighth and Fourteenth Amendments are violated when a state supreme court justice declines to recuse himself in a capital case in which he had personally approved the decision to pursue capital punishment against the defendant in his prior capacity as an elected prosecutor and continued to head the prosecutors' office that defended the death verdict on appeal, and when he had publicly expressed strong support for capital punishment during his judicial election campaign by referencing the number of defendants he had "sent" to death row, including the defendant in the case now before the court; and

2. Whether the Eighth and Fourteenth Amendments are violated by the participation of a potentially biased jurist on a multimember tribunal deciding a capital case, regardless of whether his vote is ultimately decisive.

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INTERESTS OF THE *AMICUS CURIAE*[1]

The American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in support of Petitioner and requests that the Court consider the relevant judicial ethics codes and their impact on the due process issues presented. The ABA urges this Court to conclude that due-process relief should be provided in these rare-but-egregious circumstances: where a justice of a state supreme court has disregarded uniform ethics rules and due process protections by refusing to recuse himself from a capital defendant's collateral appeal even though the justice (as the former district attorney) had personally authorized the capital prosecution and the appeal challenged the misconduct of prosecutors under the district attorney's managerial responsibility.

The ABA is one of the largest voluntary professional membership organizations in the United States and the nation's leading organization of legal professionals. Its more than 400,000 members come from all fifty states, the District of Columbia, and the United States territories. Its membership includes attorneys in law firms, corporations, non-profit organizations, and local, state, and federal governments. Members also include judges, law professors, law students, and non-lawyer

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[1] No counsel for a party authored this Brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to its preparation and submission. The parties have consented to this filing.

associates in related fields.[2]

One of the ABA's continuing goals has been to "[p]reserve the independence of the legal profession and the judiciary."[3] For over a century, the ABA has worked with lawyers, judges, scholars, and interested organizations to draft and implement ethics codes and guidelines for the administration of justice. As discussed below, every state has adopted ethics codes that are based on or consistent with the ABA's Model Code to govern judicial conduct, to help ensure that all litigants in the justice system are treated fairly and in accordance with due process, and to promote public confidence in the judiciary.

The ABA first began drafting Canons of Judicial Ethics roughly a century ago. The ABA's Committee on Judicial Ethics, which was chaired by Chief Justice William Howard Taft and comprised of judges, lawyers, and experts in judicial ethics, drafted the Canons. CHARLES G. GEYH & W WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT vii (2009). The Canons became ABA policy upon adoption by the ABA's House of Delegates.[4] The Canons, in turn, were

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[2] Neither this Brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this Brief, nor was the Brief circulated to any member of the Judicial Division Council before filing.

[3] *See, e.g.*, Am. B. Ass'n, Mission and Goals, http://www.americanbar.org/about_the_aba/aba-mission-goals.html.

[4] The House of Delegates is the ABA's policy-making body, and now has 560 delegates representing states and

adopted by the vast majority of state courts (including Pennsylvania) to guide and govern the ethics of American judges, "as indicating what the people have a right to expect from them." CANONS OF JUDICIAL ETHICS Pmbl. (1924); *see also In re Code of Judicial Conduct*, 643 So.2d 1037, 1038 (Fla. 1994) (noting that most state courts had adopted the Canons); Robert J. Martineau, *Enforcement of the Code of Judicial Conduct*, 1972 UTAH L. REV. 410, 411 (citing examples of state courts, constitutions, and statutes adopting or referencing the Canons).

In 1969, the ABA's Traynor Committee (named after its former Chair, Chief Justice Roger Traynor of the California Supreme Court) began work on the Model Code of Judicial Conduct. The final product, which the ABA adopted in 1972 and Pennsylvania adopted in 1974, was the result of "careful, time-consuming effort." E. WAYNE THODE, REPORTER'S NOTES TO CODE OF JUDICIAL CONDUCT 42-43 (1973). The Committee produced thirteen drafts and distributed 14,000 copies of its interim report and tentative draft to judges and other interested persons across the country for comment. It considered hundreds of comments. It also consulted specialized committees, composed of trial, appellate, and specialty-court judges (among others), conducted independent research, and reviewed the applicable legal scholarship, judicial conference materials, and

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territories, state and local bar associations, affiliated organizations, and the ABA's sections, divisions, and its members, among others. *See* ABA Leadership, House of Delegates General Information, http://www.americanbar.org/groups/leadership/delegates.html.

congressional testimony. *Id.* The Code was well-received in the states, with virtually every state (including Pennsylvania) eventually adopting and implementing it.

The 1972 Code was revised and updated in 1990 through a process no less rigorous. Meeting from 1987 to 1990, the Committee sent an extensive questionnaire to state and federal judges (among many others) in every jurisdiction, held public hearings, reviewed the sizeable literature on judicial conduct, and sent the discussion draft to 5,000 recipients for comments. LISA L. MILFORD, THE DEVELOPMENT OF THE ABA JUDICIAL CODE 4-5 (1992). As a result of this careful study and robust commentary, the Committee kept those Canons from the 1972 Model Code that were serving their intended purposes, including the prohibition on presiding over a case in which the judge had once served as counsel or in other situations in which the judge's impartiality might reasonably be questioned.[5] *See* MILFORD, *supra*, at 7.

The 1990 Code was amended in 2007, following an equally rigorous process. A diverse Commission composed of judges, lawyers, and academics convened in 2003, met over fifty times, held nine public hearings, posted numerous drafts for public comment, and reviewed comments from thirty-nine organizations and over 300 individuals. Mark I.

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[5] *Compare* MODEL CODE OF JUDICIAL CONDUCT Canon 3C (1972) *and* PENN. CODE OF JUDICIAL CONDUCT Canon 3C (1974) (same), *with* MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990) (similar).

Harrison, *The 2007 ABA Code of Judicial Conduct: Blueprint for a Generation of Judges*, JUDGES' J., Vol. 28, No. 3, at 257-58 (2007). As with the earlier codes, the drafters and commentators again concluded that the recusal Canons at issue were integral to the purposes of the Code and should thus be kept in essential part.[6] Therefore, the 2007 Code maintained the ethical standard that judges should recuse themselves from cases in which they formerly participated as counsel or in which their impartiality otherwise might reasonably be questioned. Most states, including Pennsylvania, have since adopted the 2007 Model Code and essentially all states have adopted recusal provisions based in whole or part on the 1972, 1990, and 2007 Model Codes.[7]

The careful process summarized above has produced a Model Code of Judicial Conduct that deserves consideration and reflects the prevailing consensus on the applicable standards of judicial recusal. All states have accordingly chosen to operate under these recusal provisions to ensure the integrity, independence, and impartiality of their

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[6] *See generally* MODEL CODE OF JUDICIAL CONDUCT R. 2.11 (2007) (continuing to conclude that judges should not sit in cases in which they had previously participated as counsel, in which they harbor a bias for or against a party, or in which their impartiality otherwise might reasonably be questioned); PENN. CODE OF JUDICIAL CONDUCT R. 2.11 (2014) (same).

[7] Of course, many states have customized their Codes, but their Codes still maintain the framework and essential elements of the Model Codes. Moreover, with minor exceptions, these state customizations do not modify the recusal Canons at issue.

judges and to promote public confidence in the fairness and integrity of their courts.

SUMMARY OF THE ARGUMENT

The recusal provisions of the ABA's Model Code of Judicial Conduct and the Pennsylvania Code of Judicial Conduct (which mirror the Model Code) proscribe judges from sitting in cases in which they have formerly participated as counsel or in which their impartiality otherwise might reasonably be questioned. In addition to preventing situations posing significant risks of judicial bias, these long-standing, uniformly adopted recusal provisions avoid the appearance of bias, thus promoting confidence in both the public and litigants that our justice system is fair and impartial. The uniform adoption of these recusal provisions reflects a national consensus that the provisions are necessary to protect the integrity and impartiality of the judiciary. The ethics codes work in tandem with due process requirements in this context to ensure actually and apparently fair proceedings, a quintessential due process goal. Finally, the requirements of the ethics codes and due process apply fully to multimember judicial panels, given the recognized potential for a judge to influence other panel members, particularly where, as here, the influencing judge is the Chief Justice.

The recusal provisions notwithstanding, Pennsylvania's Chief Justice refused to recuse himself from Petitioner's collateral appeal even though (1) the Chief Justice, as then-District Attorney of Philadelphia, had reviewed the facts of

Petitioner's case and personally authorized Petitioner's capital prosecution; (2) the appeal challenged the misconduct of prosecutors in the DA's office; and (3) the Chief Justice had broadcasted to Pennsylvanians on the judicial campaign trail that he had sent to death row forty-five defendants (including Petitioner). In these rare circumstances, due process mandates reversal in light of the serious risks, and appearance, of bias.

ARGUMENT

Consistent with the questions presented, this Brief is organized in two parts: (I) the recusal provisions of the Pennsylvania and Model Codes of Judicial Conduct, and the due process requirements with which these codes work in tandem, require recusal in these egregious circumstances; and (II) the ethics codes and due process contain no exception for multimember tribunals.[8]

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[8] The ABA will not address the Eighth Amendment issues because it takes no position on the death penalty generally. Should a state choose to use the death penalty, however, ABA policies and procedures call upon the state to "ensure that death penalty cases are administered fairly and impartially, in accordance with due process." ABA Policy # 107 (adopted Feb. 1997) (citations omitted), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/1997_my_107.authcheckdam.pdf. Additionally, with respect to the issues raised by the second question presented, the ABA will limit its discussion to the influence that a judge (and especially a chief judge) may exert in the context of a multimember panel.

I.

THE ETHICS CODES AND DUE PROCESS REQUIRE RECUSAL UNDER THESE CIRCUMSTANCES.

The failure to recuse violated the uniformly adopted recusal provisions and due process, as outlined in the following three sections: (A) the Model Code's recusal provisions (as adopted by Pennsylvania and essentially every other state) serve to prevent judicial bias and to promote public confidence in the integrity and impartiality of the judiciary; (B) the Code required recusal below; and (C) in these extreme circumstances, the Code reflects due process.

A. The Canons, Their Underlying Purposes, and Their Uniform Adoption Warrant Consideration.

As its prime objectives, the Model Code of Judicial Conduct demands the integrity, independence, and impartiality of judges and promotes public confidence in the fairness and integrity of the judiciary, which the Court has recognized as a "vital state interest . . . of the highest order." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) (quoting *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)) (internal quotation marks omitted).

Judicial independence, integrity, and impartiality have long been the guiding principles of the Canons. In 1924, the ABA's first Canons of Judicial Ethics recognized that judicial conduct "should be free from

impropriety and the appearance of impropriety."[9] CANONS OF JUDICIAL ETHICS Canon 4 (1924); *id.* Canon 30 ("A candidate for judicial position . . . should [not] create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination. . . ."); *see also generally* MILFORD, *supra*, at 4-5 ("[T]he danger caused by the appearance of impropriety consists in damaging public confidence in the judiciary."). Furthermore, to avoid the risk of bias and to promote public confidence in the fairness and impartiality of the justice system, judges were not permitted to sit in any case in which they had a personal interest.[10]

This Court has likewise "recognized the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges.'" *Williams-Yulee*, 135 S. Ct. at 1666 (quoting *Caperton*, 556 U.S. at 889).[11] Recognizing that the

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[9] This injunction includes recusal issues. *See, e.g.*, John P. Frank, *Commentary on Disqualification of Judges—Canon 3C*, 1972 UTAH L. REV. 377, 377 (citing ABA COMM. ON PROF'L ETHICS AND GRIEVANCES, OPINIONS, No. 200 (1957)).

[10] CANONS OF JUDICIAL ETHICS Canon 29 (1924); *cf. id.* Canon 26 (stating that a judge "should, so far as reasonably possible, refrain from all relations which would normally tend to arouse the suspicion that such relations warp or bias his judgment, or prevent his impartial attitude of mind in the administration of his judicial duties"); *id.* Canon 31 (stating that a judge "should not practice [law] in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy").

[11] This is so in part because:

> The importance of public confidence in the integrity of judges stems from the place of the judiciary in the government. Unlike the

"public perception of judicial integrity is a state interest of the highest order," the Model and Pennsylvania Codes accordingly have placed a high premium on public confidence. *Id.* (internal quotation marks omitted). The Codes require "judges, individually and collectively, to treat and honor the judicial office as a public trust, striving to preserve and enhance legitimacy and confidence in the legal system" and to "conduct themselves in a manner that garners the highest level of public confidence in their independence, fairness, impartiality, integrity, and competence." PENN. CODE OF JUDICIAL CONDUCT Pmbl. (2014); MODEL CODE OF JUDICIAL CONDUCT Pmbl. (2007). Moreover, judges "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[12]

> executive or the legislature, the judiciary "has no influence over either the sword or the purse; neither force nor will but merely judgment." The Federalist No. 78, p. 465 (C. Rossiter ed. 1961) (A. Hamilton) (capitalization altered). The judiciary's authority therefore depends in large measure on the public's willingness to respect and follow its decisions. As Justice Frankfurter once put it for the Court, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954).

Williams-Yulee, 135 S. Ct. at 1666.

[12] PENN. CODE R. 1.2 (2014); MODEL CODE R. 1.2 (2007); *see also* PENN. CODE Canon 2 (1974) (requiring judges to avoid the appearance of impropriety and to conduct themselves in a manner that promotes integrity and impartiality in the

The Code's recusal provisions in particular uphold both the actuality and appearance of fair and impartial courts and are the result of significant collaboration and vetting, as described above.[13] This Court has recognized that the recusal provisions in the "codes of conduct serve to maintain the integrity of the judiciary and the rule of law." *Caperton*, 556 U.S. at 889. Because they are essential to public confidence in the fairness and integrity of the nation's judges, the recusal provisions at issue have been universally adopted in the states. Thus, judges nationwide may not sit in cases in which they formerly participated as counsel.[14] Furthermore, no judge may participate "in any proceeding in which the judge's impartiality might reasonably be questioned." MODEL CODE R. 2.11(A) (2007); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C (2009) (same); MODEL CODE Canon 3E(1) (2003)

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judiciary); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2 (2009) (same); MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1972) (same). Likewise, "[a] candidate for a judicial office shall act in a manner consistent with the impartiality, integrity and independence of the judiciary." MODEL CODE Canon 5A(3)(A) (2003); MODEL CODE R. 4.2(A)(1) (2007) (same).

[13] *See generally supra* Interests of the *Amicus Curiae* (describing the careful and collaborative process by which the Code and its recusal provisions were adopted and subsequently reviewed).

[14] *See, e.g.*, ABA CENTER FOR PROF'L RESPONSIBILITY, POLICY IMPLEMENTATION COMM., COMPARISON OF ABA MODEL JUDICIAL CODE AND STATE VARIATIONS (Nov. 4, 2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.authcheckdam.pdf (noting no significant difference between the ABA Model Code provisions at issue and those of the adopting states).

(same); *see also* 28 U.S.C. § 455(a) (2000) (same); *Liteky v. United States*, 510 U.S. 540, 548 (1994) (quoting in part 28 U.S.C. § 455(a)) (noting that "quite simply and quite universally, recusal [is] required whenever 'impartiality might reasonably be questioned'").

In sum, the recusal provisions were the product of significant collaboration and vetting, and the states have unanimously adopted the provisions to prevent judicial bias and to promote public confidence in the judiciary's integrity and impartiality.

B. The Uniformly Adopted Recusal Provisions Applicable to This Case Require Recusal.

Since 1924, the Code has generally counseled recusal, and since 1972, the Code has specifically required recusal when a judge has previously participated as counsel. Even without this specific prohibition, sitting in such cases presents serious risks of bias and causes the impartiality of such judges to be reasonably questioned. All states (including Pennsylvania) and the federal courts have thus required recusal in such circumstances for decades.

At the time that Chief Justice Castille refused to recuse himself, the Pennsylvania Code (based on the 1972 Model Code) provided:

> Judges should disqualify themselves in a proceeding in which their impartiality

> might reasonably be questioned, including but not limited to instances where:
>
> (a) they have a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; [or]
>
> (b) they served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter.

PENN. CODE OF JUDICIAL CONDUCT Canon 3C (1974, as amended); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C (2009) (similar); MODEL CODE Canon 3C (1972) (same).[15] The 2007 Model Code and the 2014 Pennsylvania Code carry forward these requirements without significant amendments.[16]

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[15] The official commentary clarified that a government lawyer is not necessarily imputed with the conflicts of the lawyer's former government colleagues: "A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association." MODEL CODE OF JUDICIAL CONDUCT Canon 3C(1) cmt. (1972). The drafters of the 1990 Model Code renumbered the provisions above and made them gender neutral but did not otherwise amend these provisions.

[16] *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1), (6) (2007); PENN. CODE OF JUDICIAL CONDUCT R. 2.11 (2014)

Indeed, these requirements have been adopted universally and without controversy.[17]

Thus, the ethics codes at all relevant times prohibited a judge from participating in a case in which his impartiality might reasonably be questioned, in which he harbored a personal bias for or against a party, or in which he had previously participated as a lawyer (or public official). Here,

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(same). In the 2007 Model Code, the drafters added a specific category for former-government-employees-turned-judges, mirroring the distinction previously made in the official commentary. Such judges must recuse themselves if they "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or ha[ve] publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy." MODEL CODE R. 2.11(A)(6)(b) (2007); PENN. CODE R. 2.11 (2014) (same). This amendment became effective in Pennsylvania in 2014, after Chief Justice Castille's refusal to recuse himself or refer the matter to the full court. Because Chief Justice Castille reviewed the facts, personally authorized this capital prosecution, and supervised the office now being challenged for misconduct, that he "participated personally and substantially" cannot reasonably be disputed.

[17] *See generally* THODE, *supra*, at 63 ("If the former [governmental] agency lawyer, now a judge, served as a lawyer in the matter in controversy, he is disqualified. The judge is disqualified also if his association with an agency lawyer now before the court or his association with the matter in controversy leads to the conclusion that his impartiality might reasonably be questioned."); Penn. Jud. Ethics Comm., Formal Op. 2015-4 (citing PENN. CODE OF JUDICIAL CONDUCT R. 2.11) ("Some of the circumstances outlined in the Rule are straightforward. E.g., there is little room for discretion if the judge served as a lawyer in the matter in controversy. In those situations, the judge is disqualified.").

Chief Justice Castille had been the District Attorney of Philadelphia during Petitioner's trial and direct appeal, had reviewed at least some of the case's facts, and had personally authorized Petitioner's capital prosecution. Chief Justice Castille's participation therefore violated the recusal provisions and created the serious risk (and appearance) of bias.[18]

The failure to recuse in this case appears particularly detrimental to the public's (and Petitioner's) confidence in the fairness, integrity, and impartiality of the proceedings because Petitioner's collateral appeal raised the misconduct of prosecutors in Chief Justice Castille's former office—prosecutors whom Chief Justice Castille had an ethical duty to supervise.[19] The trial court concluded that Chief Justice Castille's former deputies had "plainly 'suppressed'" and "knowingly withheld

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[18] For example, anecdotal and empirical evidence suggests that advocates often suffer from partisan bias toward the side employing them. *See, e.g.*, Cassandra Burke Robertson, *Judgment, Identity, and Independence*, 42 CONN. L. REV. 1, 6-12 (2009) (noting that lawyers generally possess "both a 'partisan' bias that is based on an affiliation with the client or a litigation-related social cause, and a 'self-serving' bias, as the lawyer benefits from the client's success," and that these and related biases can actually alter the way in which the lawyers view the facts).

[19] "Prosecutors with managerial authority and supervisory lawyers must make 'reasonable efforts to ensure' that all lawyers and nonlawyers in their offices conform to the Rules of Professional Conduct [and] must adopt reasonable policies and procedures to achieve these goals." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) (citing MODEL RULES OF PROF'L CONDUCT R. 5.1, 5.3).

evidence" by failing to disclose mitigating and impeachment evidence and later made "less than candid" representations to the court concerning the suppressed evidence, including "grossly misrepresent[ing] the evidence in the government's files."[20] *Commonwealth v. Williams*, CP-51-CR-0823621-1984 (Phila. Ct. C.P. Nov. 27, 2012), at 41 & App. 5, 10.

In addition to his role in overseeing the DA's office being challenged, Chief Justice Castille also declared on the judicial campaign trail that he had sent to death forty-five defendants, including Petitioner.[21] These expressions may appear to the

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[20] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (requiring prosecutors to turn over such evidence); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 09-454 (2009); *see generally Smith v. Cain*, 132 S. Ct. 627 (2012) (reversing a murder conviction because the DA's office committed *Brady* violations); *Connick v. Thompson*, 131 S. Ct. 1350 (2011) (citing the ABA MODEL RULES OF PROF'L CONDUCT) ("Among prosecutors' unique ethical obligations is the duty to produce *Brady* evidence to the defense. An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.").

[21] Then-candidate Chief Justice Castille told the public:

- "'My campaign was basically that I've spent 20 years in law enforcement as a prosecutor, and the citizens want somebody who's tough on crime. My record's been just that.'" Tim Reeves, *Castille Leads GOP Sweep of Courts*, PITTSBURG POST-GAZETTE, Nov. 3, 1993 (quoting Castille);
- After attacking his opponent as soft on crime, Chief Justice Castille's television ads concluded with the following statement: "'If you are looking for a law-and-order guy—Ron Castille. He put 45 murderers on death row and has been endorsed by over 36,000

public as a bias in favor of one party (i.e., the State) over the other (i.e., the Petitioner).[22]

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professional police officers in Pennsylvania.'" Katharine Seelye, *Castille Emphasizes Law-and-Order Image*, PHILADELPHIA INQUIRER, Oct. 21, 1993 (quoting Castille).

- Finally, "'You ask people to vote for you, they want to know where you stand on the death penalty. I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get the hint.'" Lisa Brennan, *State Voters Must Choose Next Supreme Court Member*, LEGAL INTELLIGENCER, Oct. 28, 1993 (quoting Castille).

See also Petitioner's Motion to Recuse Chief Justice Castille, No. 163 EM 2012 (Pa. Sup. Ct. Oct. 1, 2012) (listing additional press accounts of then-candidate Castille's tough-on-crime boasts).

[22] *See, e.g.*, *In re Burick*, 705 N.E.2d 422, 425–26 (Ohio Comm'n of Judges 1999) (reprimanding and fining judge for proclaiming that she "will be a tough Judge that supports the death penalty and isn't afraid to use it" and will "favor[] the death penalty for convicted murderers"); *In re McMillan*, 797 So. 2d 560, 566–67 (Fla. 2001) (removing judge in part because he proclaimed that he "will go to bat for" police officers and "will always have the heart of a prosecutor"); *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1997); *Judicial Inquiry and Review Bd. v. Fink*, 532 A.2d 358, 367 (Pa. 1987); *see also generally* PENN. CODE OF JUDICIAL CONDUCT Canon 7B(1) (1974, as amended) ("Candidates . for a judicial office . should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [or] make statements that commit the candidate with respect to cases, controversies or issues that are likely to come before the court. "); PENN. CODE R. 4.2 (2014) ("A judicial candidate shall act at all times in a manner consistent with the independence, integrity, and impartiality of the judiciary. ").

Therefore, the recusal provisions and the serious risk and appearance of bias should have precluded Chief Justice Castille's participation.[23]

C. The Code Reflects Due Process in These Particular Circumstances.

Although due process and the Code are not always coextensive, they work in tandem in this case for the following reasons: (1) these uniformly adopted recusal provisions were designed to ensure fair proceedings by preventing the risk and appearance of bias; (2) fair proceedings are a quintessential due process value (particularly in death penalty cases); (3) the failure to recuse in this extreme case not only violates the ethics codes but concurrently violates due process; and (4) due process provides the necessary mechanism to enforce

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[23] *See, e.g.*, *Mixon v. United States*, 620 F.2d 486 (5th Cir. 1980) (citing 28 U.S.C. § 455(b)(3) (1976)) (vacating judgment and remanding because "the magistrate happened to have been the Assistant United States Attorney who had represented the Government in the earlier proceedings on petitioner's motion for reduction of sentence, and, therefore, he was automatically disqualified to hear petitioner's section 2255 motion"); *People v. Vasquez*, 718 N.E.2d 356, 359 (Ill. Ct. App. 1999) ("It appears that Judge Bridges actively participated as an assistant State's Attorney in the original prosecution of defendant [because he] appeared at a single status hearing, informed the trial court that the State had not yet determined whether it would seek the death penalty, and sought a continuance. . [W]e find that a postconviction proceeding is sufficiently related to the original prosecution that it falls within the scope of [the recusal rule]."); *Ajadi v. Comm'r of Correction*, 911 A.2d 712, 723-24 (Conn. 2006); *Penoyer v. State*, 945 So.2d 586, 587 (Fla. Ct. App. 2006).

the underlying values in both the Code and the Constitution.

First, the states have unanimously adopted the recusal provisions at issue to ensure the actuality and appearance of a fair and impartial judiciary. In other words, every state has essentially concluded that the risks and appearance of bias are intolerably high when a lawyer moves from advocating a case to judging it.[24] This unanimity suggests that these provisions reflect due process norms and expectations.

Second, the historical pedigree of similar recusal rules suggests that these provisions reflect the due process—and public expectations of due process—necessary to ensure fair proceedings in American courts.[25] For example, this Court has recognized elsewhere that "a universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is

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[24] As this Court has indicated, a state consensus is often entitled to careful consideration. For example, in *Williams-Yulee*, the Court remained "mindful that most States" had adopted the Canon at issue because the states' "considered judgments deserve our respect, especially because they reflect sensitive choices by States in an area central to their own governance—how to select those who 'sit as their judges.'" 135 S. Ct. at 1666 (quoting in part *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)).

[25] This suggestion should not be taken to imply that all Code violations are also due process violations. Rather, this suggestion merely highlights the historical lineage of the recusal norms at issue and notes that this lineage is one reason (among several others) indicating that these norms reflect due process in these particular circumstances.

constitutional. . . ." *Nev. Comm'n on Ethics v. Carrigan*, 131 S. Ct. 2343 (2011) (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 785 (2002)) (internal quotation marks omitted). Moreover, "early congressional enactments 'provid[e] contemporaneous and weighty evidence of the Constitution's meaning.'" *Id.* (quoting *Printz v. United States*, 521 U.S. 898, 905 (1997)). The *Carrigan* Court recounted the significant history of recusal rules:

> Federal conflict-of-interest rules applicable to judges . . . date back to the founding. In 1792, Congress passed a law requiring district court judges to recuse themselves if they had a personal interest in a suit or had been counsel to a party appearing before them. In 1821, Congress expanded these bases for recusal to include situations in which "the judge . . . is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit." The statute was again expanded in 1911, to make any "personal bias or prejudice" a basis for recusal. The current version, which retains much of the 1911 version's language, is codified at 28 U.S.C. § 144.[26]

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[26] *See also generally* CHARLES GARDNER GEYH, JUDICIAL DISQUALIFICATION: AN ANALYSIS OF FEDERAL LAW 5 (2d ed. 2010) ("In 1792, the U.S. Congress codified the common law

Carrigan, 131 S. Ct. 2343 (citations omitted). In addition to the federal-court history, "[a] number of States enacted early judicial recusal laws as well." *See, e.g., id.* at 2349 n.4 Although the Model Code provisions particularly applicable here are of more recent vintage (1972), similar recusal rules and standards have been in place even longer and are consistent with due process.

Third, these provisions reflect the universal judgment that the conduct at issue presents a serious risk and appearance of bias, which endangers the fair proceedings fundamental to due process. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Johnson v. Miss.*, 403 U.S. 212, 216 (1971); *see also Williams-Yulee*, 135 S. Ct. 1656 (Scalia, J., dissenting) ("Unlike a legislator, a judge must be impartial—without bias for or against any party or attorney who comes before him."). Justice must be disinterested and impartial in both actuality *and appearance*.[27] *Aetna Life Ins. Co. v.*

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by calling for disqualification of a district judge who was 'concerned in interest,' but added that a judge could also be disqualified if he 'has been of counsel for either party.'"). To this day, Section 455 specifically prohibits the conduct at issue. 28 U.S.C. § 455(b)(2)-(3). Analogously, moreover, a long-standing rule prohibits judges from sitting on appeal of their own rulings. GEYH, *supra*, at 5. Chief Justice Castille essentially sat on appeal of his own decision to seek the death penalty and of the trial court's finding of prosecutorial misconduct in his office.

[27] In addition to satisfying public confidence in the judiciary's integrity and impartiality, this appearance-based

Lavoie, 475 U.S. 813, 825 (1986) ("The Due Process Clause may sometimes bar trial by judges who have no actual bias . . . . But to perform its high function in the best way, justice must satisfy the appearance of justice.") (internal quotation marks and citations omitted); *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt*, 348 U.S. at 14) (noting that not only actual justice but the "appearance of justice" must be satisfied); *Public Utilities Comm'n v. Pollack*, 343 U.S. 451, 466-67 (1952) (Frankfurter, J.) ("The guiding consideration [in recusal] is that the administration of justice should reasonably appear to be disinterested as well as be so in fact."). Due process and the Code speak in unison in this regard.

To satisfy the appearance of justice, the Court has held that due process requires disqualification on the following bases (among others): (1) a twelve-dollar interest in the case's outcome;[28] (2) an interest in the town's general fisc;[29] (3) involvement of a business competitor; [30] (4) participation in the

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test avoids difficult inquiries into, and problematic accusations of, actual bias. *See, e.g.*, *Caperton*, 556 U.S. at 883 ("The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules.").

[28] *Tumey v. Ohio*, 273 U.S. 510 (1927).

[29] *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (holding that due process required disqualification of a dual mayor-judge because, as judge, the fines he imposed on conviction partially funded the town's general fisc, and as mayor, his interest in the town's finances gave him a "possible temptation" to convict).

[30] *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (holding that an administrative board of optometrists had a

accusatory process before trial (a circumstance analogous to Chief Justice Castille's previous participation in Petitioner's case);[31] (5) relatively small business dealings with a party approximately one year earlier;[32] (6) an interest in the type of (but not the actual) legal claim;[33] and (7) of course, receiving the benefit of a litigant's significant independent expenditures.[34] As the Court has taken care to note, the disqualified judges in each of these instances were not necessarily biased, but the risk

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disqualifying pecuniary interest when presiding over a hearing against competing optometrists).

[31] *Murchison*, 349 U.S. at 137 ("Having been a part of that [accusatory process of a one-judge grand jury] a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.") (footnote omitted); *cf. also Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971) (concluding that due process requires "a defendant in criminal contempt proceedings be given a public trial before a judge other than the one reviled by the contemnor").

[32] *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145 (1968) (applying the holding to arbitrators but unanimously agreeing that the standards articulated in the opinion would apply to judges).

[33] *Aetna*, 475 U.S. at 823-25 (vacating judgment that enhanced the legal claim of the justice who authored the state court's opinion).

[34] *Caperton*, 129 S. Ct. at 2263–64 ("We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.").

and appearance of bias and impropriety were too significant for due process to ignore.

Although not every violation of the applicable Canons also violates a litigant's due process rights,[35] the failure to recuse at issue violates both. The head prosecutor, who had reviewed the facts and personally authorized the capital prosecution, became the Chief Justice who presided over the collateral appeal—and the appeal raised issues regarding the ethical misconduct of the very same prosecutors whom the Chief Justice (as head prosecutor) would have had a duty to manage.

Furthermore, Chief Justice Castille was not only the head justice over Petitioner's appeal but also the head prosecutor over Petitioner's conviction. Heads of office are often more heavily scrutinized under the applicable ethics rules in light of their actual and apparent prominence and influence.[36] They are the public face, appear on official communications,[37]

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[35] *See, e.g., id.* at 2267.

[36] *See, e.g., United States v. Smith*, 995 F.2d 662, 675-76 (7th Cir. 1993) (disqualifying defense lawyer because he had served as chief prosecutor during the underlying investigation, had supervisory responsibilities over the prosecutors, had attended two high-level departmental meetings regarding the investigation, and had signed one immunity agreement); *Sec. Inv. Protection Corp. v. Vigman*, 587 F. Supp. 1358, 1366-67 (C.D. Cal. 1984) (disqualifying lawyer because, as a former regional administrator of the SEC, he signed the complaint and trial brief in a related matter).

[37] Here, for example, Chief Justice Castille's name was on the state's brief in Petitioner's direct appeal and on the stationery sent to the parole board requesting relief for Petitioner's co-defendant. As the trial court found, Chief

have general access to the files, make the policies, and have the ability to fire or otherwise discipline subordinates. Although a more difficult disqualification question would arise if the former head of office had no actual contact with the applicable case, Chief Justice Castille indisputably reviewed the factual memorandum and personally authorized this capital prosecution.

Fourth, and finally, the Code and due process have a symbiotic, if not dependent, relationship in this case. Recusal questions, in the first analysis, are answered by the judge whose impartiality is in question. If the judge fails to honor the Code, the litigant might be able to raise the disqualification issue with a presiding judge or another (often superior) court. If, however, the judge sits on a state court of last resort and fails to honor the Code (and the due process norms embedded in it), the litigant in reality has no recourse and the Code has no further enforcement mechanism—save due process. Disciplining the judge after-the-fact does not assist the litigant and may not adequately restore public confidence in the court (especially following a highly publicized decision); the disciplinary process never alters the decision in the underlying case.[38] State

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Justice Castille's office failed to disclose this agreement to write a letter to the parole board in exchange for the co-defendant's testimony, and the co-defendant falsely denied its existence at trial (and the trial prosecutor never corrected this false testimony). *See generally Giglio v. United States*, 405 U.S. 150 (1972) (concluding that failure to disclose such information may violate due process).

[38] In any event, no evidence suggests that Chief Justice Castille was ever investigated or disciplined for his conduct.

judges are nevertheless bound by state law and the Constitution (including the Code and due process, respectively), and the proper, timely, and essentially only course for an aggrieved litigant in these circumstances is to raise the due process violation.

In sum, although due process is not violated whenever a judge violates the Code, these extreme circumstances violate due process and warrant a remedy. Having personally authorized this capital prosecution and having general supervisory authority over the deputies whose misconduct was at issue, Chief Justice Castille could not be, or appear to be, the disinterested and impartial jurist required by due process.[39] Simply put, the "serious risk of actual bias—based on objective and reasonable perceptions"—is intolerably high when the same person has occupied the conflicting positions of both prosecutor and judge in the same controversy.[40] *Caperton*, 129 S. Ct. at 2263–64.

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[39] "These are circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Caperton*, 129 S. Ct. at 2263 (quoting *Withrow*, 421 U.S. at 47); *see also id.* at 2266 (stating that recusal is required whenever there is an "unconstitutional probability of bias"). The Court has been quite clear, however, that actual bias is not required for reversal. *Id.* at 2263.

[40] *See, e.g.*, *Ward*, 409 U.S. at 60 (quoting *Tumey*, 273 U.S. at 534) (noting that due process is violated in a "'situation in which an official occupies two practically and seriously inconsistent positions, one partisan and the other judicial'"); *Murchison*, 349 U.S. at 137 ("Having been a part of that [accusatory process] a judge cannot be wholly disinterested in the conviction or acquittal of those accused. Fair trials are too important a part of our free society to let prosecuting

II.

THE REQUIREMENTS OF THE CODE AND DUE PROCESS APPLY TO JUDGES IN MULTIMEMBER TRIBUNALS.

That the judge whose conduct is at issue served on a multimember tribunal does not detract from the analysis above. The recusal provisions apply to each individual judge, including Pennsylvania justices, and the requirements of the Code and due process do not vanish simply because the disqualified judge happens to sit on an appellate or other multimember tribunal. Indeed, in addition to the generally greater visibility of appellate courts to the public eye, appellate decisions usually are collaborative and influenced by the composition of judges. *See, e.g.*, *Aetna*, 475 U.S. at 833 (Blackmun, J., concurring) (noting that "the collegial decision-making process that is the hallmark of multimember courts [might lead the opinion's] author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity. And because this collegial exchange of ideas occurs in private, a reviewing court may never discover the actual effect a biased judge had on the outcome of a particular case."); Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals*, 157 PENN. L. REV. 1319, 1322 (2009) (noting that "federal appeals court judges do *not* vote the same way regardless of panel composition, but instead appear to be influenced by the preferences of the other judges with whom they

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judges be trial judges of the charges they prefer.") (footnote omitted).

sit when deciding a case" and citing several studies finding such so-called "panel effects"). Thus, regardless of whether a judge sits alone or on a multimember panel, the damage to the litigant's and the public's confidence in the judiciary and to the fairness of the proceeding is largely the same whenever a judge continues to participate in a case from which that judge should be disqualified.[41]

Even if the applicable recusal provisions had a harmless error exception (which they do not), this would be an inappropriate case for such an exception. Here, the disqualified judge is the Chief Justice, who serves as the court's most prominent member, exercises administrative oversight, and assigns certain opinions.[42] As part of the "collegial decision-making process," *Aetna*, 475 U.S. at 833

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[41] Analogously, this Court has not hesitated to vacate a decision of a circuit court even though only "one member of that court had been prohibited by statute from taking part in the hearing and decision of the appeal." *Nguyen v. United States*, 539 U.S. 69, 78 (2003) (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962); *Am. Constr. Co. v. Jacksonville, T. & K. W R. Co.*, 148 U.S. 372 (1893)).

[42] Penn. Sup. Ct. Internal Operating Procedures § 63.3(A)(3) (1994) ("The Chief Justice shall preside at the conference [discussing cases], lead the Court's discussion, and call for a tentative vote on the decision of each case. "); *id.* § 63.3(B) ("All motions, petitions and applications will be assigned to the Chief Justice, except for emergency motions, motions addressed to a single Justice, and applications for stay of execution in capital cases."); *cf.* PENN. CODE OF JUDICIAL CONDUCT R. 2.12(B) (2014); MODEL CODE R. 2.12(B) (2007) (noting the increased responsibilities of supervisory judges). Of note, should this Court reverse and remand, Pennsylvania has a new Chief Justice (and several new associate justices).

(Blackmun, J., concurring), the Chief Justice voted against his former adversaries (Petitioner and his counsel) in essentially the same case in which he had previously participated as head prosecutor. He then wrote a concurrence (which another justice joined) criticizing his former adversaries and defending his former employees (whom he had an ethical duty to supervise).[43] Thus, the appearance and actuality of the disqualified judge's influence on the multimember court should preclude a deviation from the requirements of the recusal provisions and due process.

In sum, Chief Justice Castille's full participation as a member of his collaborative court unconstitutionally tainted the judgment below with a serious risk and appearance of bias.

CONCLUSION

For the reasons set out above, *amicus curiae* the American Bar Association respectfully requests the

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[43] After Chief Justice Castille switched from authorizing and overseeing Petitioner's capital prosecution to judging Petitioner's collateral appeal raising misconduct in the DA's office, Chief Justice Castille, in his concurring opinion, criticized the trial court for its "frivolous *Brady* claim," for "losing sight of its role as neutral arbiter," and for permitting discovery into "the government's files" (including files of the DA's office during the time that Chief Justice Castille headed that office). *See Commonwealth v. Williams*, Nos. 668-69 CAP (Pa. Sup. Ct. Dec. 15, 2014) (Castille, C.J., concurring) (expressing dismay that the trial court took the "lawless step of essentially opening the prosecutor's files to appellee's counsel").

Court to reverse the judgment of the Supreme Court of Pennsylvania.

RESPECTFULLY SUBMITTED this 4th day of December, 2015.

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No. 15-5040

IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

—v.—

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF PENNSYLVANIA IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and the nation's civil rights laws. The ACLU of Pennsylvania is one of its statewide affiliates. *Amici* respectfully submit this brief to assist the Court in considering the constitutionality of the presiding Chief Justice's participation in the appellate review of this capital case by the Pennsylvania Supreme Court when he had previously authorized the seeking of the death penalty against Petitioner in his former role as the Philadelphia County District Attorney. Given the ACLU's longstanding interest in the protections contained in the Constitution, including the Eighth Amendment's prohibition against cruel and unusual punishment, the proper resolution of this case is a matter of substantial importance to the ACLU and its members.

STATEMENT OF THE CASE

Three months past his eighteenth birthday, Terry Williams, along with Marc Draper, killed Amos Norwood in a Philadelphia cemetery in June 1984. Newly-elected Philadelphia County District Attorney Ronald Castille authorized his assistants to seek the death penalty against Williams. JA 426a.

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[1] Letters of consent from the parties have been submitted to the Clerk of the Court. No counsel for a party has authored this brief in whole or in part, and no one has made a monetary contribution intended to fund the preparation or submission of this brief, other than *amici*, its members, and its counsel.

Terry Williams met his trial attorney Nicholas Panarella for the first time the day before jury selection began, though he had been appointed 18 months earlier. Trial Tr. 15, 17-18, 22, 1/6/1986.[2] The entire sentencing phase of the trial took little more than an hour, completed hastily in the late afternoon following the jury's guilt phase verdict. Panarella presented three witnesses on Williams's behalf at sentencing: his mother and two other witnesses she had brought with her to the courtroom. Panarella made a weak plea for mercy, emphasizing Williams's youth, his family's support, and the difficulty of prison life. Finding no mitigating circumstances, the jury returned a death verdict.

At trial, Assistant District Attorney Andrea Foulkes painted a convincing picture for the jury that Williams killed Norwood for "no other reason" than to rob a kind church volunteer. Trial Tr. 1873, 2/3/1986. She did not share with the jury, or defense counsel, the contrary evidence that Norwood, almost 40 years Williams's senior, had sexually exploited young men for years, including Williams. She kept to herself the reports by Rev. Charles Poindexter, the minister at Norwood's church and a key prosecution witness at trial, that a member of the congregation

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[2] Transcripts from the trial proceedings are cited as "Trial Tr." Transcripts from post-conviction proceedings under the Pennsylvania Post-Conviction Relief Act are cited as "PCRA Tr." Declarations included in the Appendix to the Petition for Post-Conviction Relief filed in *Commonwealth v. Williams*, Nos. 2362-2367 in the Philadelphia County Court of Common Pleas on July 16, 2012, and in the Supplemental Appendix filed on July 27, 2012, are cited as "PC Appendix." Exhibits filed in the same court on February 24, 1997 during post-conviction proceedings in 1998 are cited as "PC Ex."

had reported to him that had Norwood sexually assaulted her 16-year old son, and that there were possibly other incidents. She didn't disclose that the victim's own wife, Mamie Norwood, another key prosecution witness, had told law enforcement and the prosecutor a bizarre story about awaking to find her husband with a "young, slim male" in their home in the middle of the night one night, that her husband asked for money and then left with the young man, returning many hours later. Upon his return the next morning, Norwood explained to his wife that he had been abducted but was able to escape from his kidnappers using "psychology" and urged her not to involve the police. Foulkes sanitized the witness statements she did produce in discovery to omit entirely these references to Norwood's illicit sexual exploits with young men.

Foulkes also kept from the jury and defense counsel the fact that co-defendant Marc Draper – the only other person besides Williams who could describe the circumstances surrounding Norwood's death – had told the prosecutor that on the night of Norwood's murder, Williams had snapped, and that he killed Norwood based on their prior sexual relationship. Foulkes hid from the jury the fact that she and law enforcement had pressured Draper to stick with the story that the case was about a robbery and nothing more. She also kept from the jury that, in addition to his plea agreement to life, Draper had been given another promise for his testimony against Williams: the prosecutor would write a letter to the parole board on his behalf. She stood by in silence as Draper testified falsely that no promises were made to him beyond his plea agreement to a life sentence. JA 155a-56a.

For more than 25 years, throughout Williams's trial and appellate proceedings,[3] the prosecution insisted that it had no evidence of any illicit sexual activity by Norwood and vigorously fought Williams's counsel's efforts to obtain and present any evidence along these lines. It did so despite the irrefutable evidence tucked away in the prosecution's own files, including several notes written by Foulkes herself. For decades, Williams had argued unsuccessfully in state post-conviction proceedings that his trial counsel had been ineffective in failing to investigate and present a wealth of evidence in mitigation, including evidence of Norwood's sexual molestation of teenage boys. In federal habeas proceedings, the courts agreed that counsel's performance had been deficient, but found that the state courts' determination that counsel's deficiency had not prejudiced Williams was not unreasonable, relying heavily on the State's claim that the only source of evidence of Norwood's illicit sexual behavior was Williams's motivated family and friend witnesses.

The truth did not come to light until 2012, as Williams neared the end of his federal habeas corpus proceedings, and counsel started preparing for an execution date. Counsel made a last-ditch attempt to speak with Draper, though he had never been willing to talk before. Given Williams's impending execution, Draper agreed to meet with Williams's team. At the meeting, he disclosed that he had told law enforcement and the prosecutor that the reason

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[3] Still in his capacity as District Attorney, Ronald Castille also appeared as counsel, with others in his office, in the response to Williams's direct appeal brief before the Pennsylvania Supreme Court. JA 206a-207a.

for the Norwood killing was not robbery at all, but Norwood's prior sexual abuse of Williams. Both the prosecution and law enforcement had pressured him to testify that the motive was robbery.

Equipped with these new revelations from Draper, counsel filed a successor post-conviction petition in state court. In connection with the proceedings that followed, counsel was finally able to obtain a discovery order for the prosecution and law enforcement files – discovery it had sought unsuccessfully for decades. It was then that counsel obtained the previously undisclosed records and the full, un-sanitized statements of Mamie Norwood and Rev. Poindexter. Counsel filed a new post-conviction petition in state court, alleging that the prosecution's failure to disclose the evidence in its possession violated *Brady v. Maryland*, 373 U.S. 83 (1963). After an extensive evidentiary hearing, the state habeas judge found that the prosecution had suppressed the evidence and engaged in gamesmanship in an effort to secure a conviction and death sentence against Williams. The court ordered a new sentencing hearing.

The State appealed to the Pennsylvania Supreme Court, where former Philadelphia County District Attorney Ronald Castille was now serving as Chief Justice. Chief Justice Castille refused to recuse himself or to refer the recusal motion to the full court, despite his prior role in Williams's case. JA 171a. As a result, the same District Attorney to authorize the death penalty against Williams had now become a key decision maker in his appeal. Presented with damning findings by the trial court, Chief Justice Castille was now called to consider the

integrity of the very office he ran and the very employees he supervised.

Led by Chief Justice Castille in its deliberation and decision, the Pennsylvania Supreme Court reversed the trial court's grant of sentencing phase relief. JA 36a. Chief Justice Castille joined the majority opinion and also filed a separate concurrence. He devoted a substantial portion of his opinion to lambasting Williams's post-conviction counsel and the judge who presided over the habeas case. JA 38a-63a. Williams thus never had the benefit of a fully dispassionate appellate court to review the trial court's grant of sentencing relief.

SUMMARY OF ARGUMENT

Petitioner's brief persuasively addresses why this Court must remand to the Pennsylvania Supreme Court for reconsideration of the habeas court's grant of sentencing phase relief, in light of Chief Justice Castille's prior personal involvement in the case as Philadelphia's elected District Attorney.

On any record, this patent conflict of interest would require reversal of the decision below. The importance of preserving both the fact and appearance of judicial impartiality, however, is highlighted by this record, which reveals a death sentence tainted from the outset by prosecutorial misconduct and constitutionally inadequate representation. Put simply, the prosecutor did not fulfill her role, defense counsel did not fulfill his role, and Chief Justice Castille assumed a role that he should not have played by adjudicating a case that he had previously prosecuted. The Constitution requires more before someone can be sentenced to

death. The prosecution's failure to disclose evidence regarding Norwood's inappropriate sexual activity with boys, including Williams, blindfolded the jury to the real motive behind Norwood's murder and his true character. Had this evidence been available to the jury, there is more than a reasonable probability that it would not have imposed a death sentence based on subsequent affirmations to that effect by five jurors. *See* p. 17, *infra*. Having withheld this critical evidence from the jury, the prosecution then continued to withhold it from both state and federal habeas courts for decades.

The prosecution's conduct is sufficient to require reversal, but it was magnified in this case by defense counsel's own failure to uncover or present the extraordinary terror, violence, and neglect Williams suffered at home at the hands of his mother and step-father and the sexual violence he endured throughout his young life by older men, including Norwood.

Given the facts of this case and Chief Justice Castille's role in reviewing them, this Court cannot have confidence that Williams's serious allegations of constitutional error – allegations that were sufficient to earn him sentencing relief and a stay of execution from the lower court – were adjudicated with the heightened reliability demanded by the Eighth Amendment.

Due process, by definition, requires impartial justice. This is especially true in capital cases, where the Eighth Amendment mandates enhanced reliability in capital sentencing. This requirement both protects the rights of the accused and promotes

public confidence that the ultimate punishment is not meted out in an arbitrary manner.

Here, Chief Justice Castille deliberated with his fellow justices in assessing whether attorneys he supervised had violated the rights of a criminal defendant in a death penalty proceeding he authorized. The notion of enhanced reliability under the Eighth Amendment cannot be squared with a rule that allows a biased judge to hear a capital appeal so long as he does not cast the deciding vote.

ARGUMENT

In capital cases, this Court has relied on the need for heightened reliability in the imposition of a death sentence. "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) (quoting *Gardner v. Florida*, 430 U.S. 349, 363 (1977) (White, J., concurring in judgment) and *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). *See also Caldwell v. Mississippi*, 472 U.S. 320, 329 (1985) ("[M]any of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion."). The death sentence against Terry Williams, tainted by prosecutorial misconduct and abysmal trial representation, does not withstand appropriate scrutiny under the Eighth Amendment, which it did not and could not receive from the court

below given the involvement of Chief Justice Castille in the deliberations and decision.

I. The Prosecution Secured And Retained A Death Sentence Against Terry Williams By Suppressing Critical Evidence about Norwood's Sexual Predation Of Young Men, Including Williams.

A prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). *See also Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("Society wins not only when the guilty are convicted but when criminal trials are fair.").

For nearly 25 years, the prosecution violated its duty to seek justice in this case by concealing critical evidence that would have cast the crime and Terry Williams in an entirely different light than the one presented to the jury, and deprived Williams of his constitutional right to due process. *Brady*, 373 U.S. at 86; *Kyles v. Whitley*, 514 U.S. 419, 432 (1995). The State withheld the truth about the crime and Norwood's true character from the jury and defense counsel, and failed to correct false testimony by a critical witness. By allowing the jury to rely on "materially inaccurate" evidence, the State rendered Williams's death sentence wholly unreliable under the Eighth Amendment. *See Johnson*, 486 U.S. at 590.

At the start of the case, the trial judge ordered Assistant District Attorney Foulkes to disclose any favorable evidence to the defense, and in light of the serious charges against Williams, asked her to construe her discovery obligations "liberally, even peripherally so." Trial Tr. 105, 1/6/1986. Foulkes flouted the court's order and her constitutional obligations and concealed evidence in the State's possession that Norwood had sexually abused young men, including Williams.

Foulkes had already tested similar evidence in a previous murder case against Williams and knew its power for his defense. Just the year before, Foulkes had vigorously sought a death sentence against Williams, a juvenile at the time, for the murder of Herbert Hamilton.[4] Like Norwood, Hamilton was an older man who had sexually exploited Williams, and the homicide against Hamilton was similarly brutal to Norwood's. But in the Hamilton case, with Williams represented by different counsel, the jury heard evidence about Hamilton's sexual predation against him and others. The jury returned a verdict of third-degree murder. Years later, Foulkes attributed the Hamilton verdict to the evidence of "sexual overtones and relationships and what have-you." PCRA Tr. 80, 9/20/2012 (A.M.).

Foulkes determined to get a different result in this case. In preparation for the Norwood trial, she scrubbed all references to Norwood's sexual exploits

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[4] Williams was 17 years old when he killed Hamilton. A 17-year old capital defendant was still eligible for the death penalty under the Eighth Amendment at that time. *See Stanford v. Kentucky*, 492 U.S. 361, 380 (1989).

of young boys in the disclosures she did make to defense counsel, and failed to disclose other evidence entirely. At sentencing, she presented evidence of Williams's conviction for the Hamilton murder as an aggravating circumstance, ensured that the jury had no knowledge of Williams's relationship with Hamilton, and insisted that Williams had taken "two innocent lives of persons who were older . . . ." Trial Tr. 1876-77, 2/3/1986. Though Foulkes later admitted she suspected a sexual relationship between Norwood and Williams at the time she prosecuted his case, PCRA Tr. 110, 9/20/2012 (A.M.), at trial she "made certain that the jury did not see that sexual connection." JA 149a.

With the evidence concealed, Foulkes was allowed to present an unchallenged portrait of Norwood as a kind church volunteer who was generous of his time with underprivileged youth in the community.[5] Trial Tr. 157-58, 166-67, 172-74, 1/19/86. She urged the jury to consider Norwood's "innocent" nature in considering the appropriate sentence for Williams. Trial Tr. 1876-77, 2/3/1986. She argued that Williams killed Norwood "for no other reason but that a kind man offered him a ride home." Trial Tr. 1873, 2/3/1986.

With the evidence concealed, the prosecution was able to elicit unimpeached character testimony from Rev. Charles Poindexter that Norwood had "special responsibility in the church regarding

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[5] She did so, despite her affirmative constitutional and ethical duties to correct before a tribunal testimony which she knows, or should know, to be false or highly misleading. *Napue v. Illinois*, 360 U.S. 264, 269 (1959); Pa. R. Prof. Conduct 3.3(a)(3).

youth;" that he worked for many years with acolytes; that he had founded a youth fellowship program for children between the ages of 7 and 18; that he "frequently" "transport[ed] young people from the church activities to their homes" and other locations, often at night; and that he was involved in outreach efforts with non-member youth in the community. Trial Tr. 166-72, 1/14/1986. When defense counsel vaguely asked Poindexter about Norwood having a "problem in the past," Foulkes immediately cut him off. Trial Tr. 172-74, 1/14/1986.

With the evidence concealed, Foulkes was also able to elicit unimpeached testimony from Norwood's wife, Mamie Norwood, that he was helping out young people in the community. Mamie testified that Norwood would "take young people back and forth from time to time in his car," that he would do this "every week," that he would "chauffeur young people from one point to another," taking them home. Trial Tr. 157-58, 1/14/1986. She would sometimes "see evidence of that chauffeuring process by things left in the car." *Id.*

For more than twenty years of post-conviction proceedings, in an effort to establish trial counsel's ineffectiveness in failing to investigate and present mitigating evidence, defense counsel fought to uncover evidence of Norwood's sexual history while the prosecution steadfastly opposed these efforts. Throughout these appellate proceedings, the prosecution maintained there was no evidence about Norwood's sexual exploits that had not been turned over to the defense and consistently attacked defense counsel's evidence suggesting otherwise as suspect.

During the initial state-post conviction hearing, as Williams's counsel sought to establish that Norwood had been sexually abusive towards young boys, including Williams, counsel questioned defense witness James Villarreal about his knowledge of Norwood's reputation for sexually abusing young boys. It was met with great skepticism and hostility from the judge – the same judge who had presided over the trial. He interrupted counsel's direct examination and grilled Villarreal about the source of his knowledge. PCRA Tr. 225-235, 4/8/1998. He demanded specifics from Villarreal, "[b]ecause that did never come up in the trial and the way this trial was conducted, there was nothing in it about that." *Id.* at 235. He found Villarreal's testimony that the jury may not have known the whole truth – that the murder was not in fact motivated by a robbery – to be "an insult to the jurors who heard this case." *Id.* at 236.

The judge asked the prosecution specifically if there was anything "in the case involving Norwood's homosexuality or violation of young boys." PCRA Tr. 237, 4/8/1998. The prosecution answered no. *Id.* Later in the same hearing, counsel again sought to elicit information about Norwood's sexual behavior through another defense witness Donald Fisher, one of Williams's childhood friends who also had dealings with Norwood. Trial Tr. 602-605, 4/13/1998. The prosecution objected repeatedly, maintaining that Fisher had not established a basis for his knowledge. *Id.* at 599, 602, 603. The judge allowed Fisher's testimony to continue for the record, but made very clear that it had limited probative value in his mind. *Id.* at 599-600, 602-605.

The court ultimately ruled against Williams and found that his trial counsel was not ineffective in failing to investigate and present evidence of Norwood's sexual abuse of others, including Williams, as mitigation. The Pennsylvania Supreme Court affirmed on appeal, though it acknowledged that the mitigation presentation had not been powerful. *Commonwealth v. Williams*, 863 A.2d 505, 520 (Pa. 2004). Two dissenting justices found "that the record paints a fairly stark picture of penalty-phase ineffectiveness of counsel." *Id.* at 535 (Saylor, J., dissenting).

As the case entered federal habeas corpus proceedings, counsel once more attempted to present evidence of Norwood's sexual abuse of Williams and others, in an effort to establish that Williams's counsel had been ineffective in his failure to investigate and present mitigating evidence in the case. The State continued to insist that the allegations lacked credibility. *See, e.g.*, Response to Penalty-Phase Claims in the Petition for Writ of Habeas Corpus at 89, *Williams v. Beard*, No. 05-cv-3486 (E.D. Pa. October 20, 2006) (dismissing testimony about sexual abuse by Norwood as unsupported "gossip"); Memorandum at 76, *Williams v. Beard*, No. 05-cv-3486 (E.D. Pa. May 8, 2007) ("Respondents suggest that the 'evidence' of physical and sexual abuse presented to the PCRA court is tainted because it is based on the reports of biased family members and friends."). The lack of support for the allegations of sexual misconduct was a determining factor in the denial of Williams's federal habeas corpus claim. Disagreeing with the state court, the federal district court found that trial counsel had in fact been deficient in his failure to

uncover and present evidence of Williams's life history. *Id.* at 92. But the court held that the state court's finding that Williams had not been prejudiced by the constitutionally deficient trial court representation he received was not unreasonable. *Id.* at 101. The Third Circuit affirmed, relying heavily on the State's attacks on the credibility of the sexual abuse evidence. *Williams v. Beard*, 637 F.3d 195, 230 n.26 (3d Cir. 2011) (finding the State's argument that the evidence of Norwood's sexual misconduct lacked reliability to be "well taken and factor[ing] it into our prejudice analysis accordingly").

At the subsequent state post-conviction hearing in 2012, Foulkes admitted that she suspected a sexual connection between Norwood and Williams and that "of course" it had occurred to her that their relationship factored into the killing. PCRA Tr. 109-110, 9/20/2012 (P.M.). Still, she maintained that it was merely her suspicion, that she did not have a "scintilla" of evidence suggesting a homosexual connection between Williams and Norwood, and that all witnesses who were asked if they knew of any sexual abuse by Mr. Norwood "all said no." PCRA Tr. 135, 9/20/2012 (A.M.); *Id.* at 99, 9/20/2012 (P.M.).

Based on the evidence to the contrary in the State's own file, including notes written by Foulkes herself, the state habeas court found that Foulkes was not credible. JA 147a. In order to obtain a conviction and death sentence against Williams, the court found, Foulkes "engaged in 'gamesmanship,'" and "knowingly suppress[ed] evidence" concerning Norwood's sexual exploits. JA 75a. The court found that she had played "fast and loose" with the truth,

"took unfair measures to win," and "had no problem disregarding her ethical obligations." PCRA Tr. 37, 39, 45, 9/28/2012.

The evidence of Norwood's inappropriate sexual behavior would have undoubtedly had an impact on the Norwood trial, and would likely have saved Williams's life, as it had in the Hamilton trial. Had Williams's trial counsel known about the evidence of Norwood's illicit sexual activity with other young men in the State's possession, he could have presented it in the penalty phase as mitigating "circumstances of his offense." 42 Pa. Cons. Stat. § 9711(e)(8). With Rev. Poindexter's complete, un-sanitized statement, counsel could have credibly challenged Rev. Poindexter's characterization of Norwood's dealings with the church youth as purely benevolent. He could have questioned Rev. Poindexter about the complaint he had received about Norwood in the past regarding teenager Ronald House, and his suspicions that Norwood was having inappropriate relationships with other young men. With her complete, un-sanitized statement, defense counsel could have questioned Mamie Norwood about the strange scene she had shared with the prosecution, when her husband had brought a young man into their home in the middle of the night, drove away with the young man, and did not return until the next morning. Counsel could have called Ronald House as a penalty phase witness, to describe his own sexual victimization at Norwood's hands. These revelations would have also led counsel to investigate Norwood's other potential victims. Without the evidence in the State's possession, as the habeas court realized, "any allegation or insinuation from appellee that he had a sexual encounter with

Mr. Norwood . . . would have merely seemed like an attempt by appellee to sling mud on the victim's character," JA 112a, as it had for decades in post-conviction proceedings.

The evidence would have been a bombshell to the jurors who were only told that Williams had killed Norwood "for no other reason but that a kind man offered him a ride home." Trial Tr. 1873, 2/3/1986. The constitutional test for penalty-phase prejudice is whether there is "a "reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003). Here, that test is unquestionably met. Indeed, at least *five* jurors who served in this case later affirmed that they would have voted for a sentence less than death had they known about Norwood's victimization of Williams. *See* Sturgis Decl. ¶ 2, PC Appendix, Tab 22. ("If I had known those circumstances at that time – what had led him down that path – that definitely would have been a factor and my decision would have been different than the death sentence."); Moss Decl. ¶ 2, PC Appendix, Tab 21 ("If I had known about the sexual abuse and how it related to the crime, it would have changed my mindset. I would have voted for a life sentence."); Brown Decl. ¶ 4, PC Appendix, Tab 20 ("If I had known that Terrance Williams had a sexual relationship with the older male victim, that definitely would have made a difference. That would have been shocking. I certainly think he would not have been sentenced to death."); Pagano Decl. ¶ 5, PC Appendix, Tab 19 ("If I had known that [Williams was sexually abused by Norwood], it would have impacted my decision. Hopefully there would have been a choice where he would have been in jail and

would have gotten psychological counseling. My choice would have been life without parole if my only two choices were that or the death penalty."); Maisenhelder Decl. ¶ 2, PC Appendix, Tab 23 ("Now that I know that he was a victim of sexual abuse by Mr. Norwood, I would have voted for life without parole instead of the death sentence.").[6]

In concealing the *Brady* evidence, the prosecution kept the truth from the jury, defense counsel, and the many courts that reviewed this case through federal habeas corpus proceedings. Had the prosecution fulfilled its obligations, the evidence would have almost certainly saved Williams's life. Its concealment instead sent Terry Williams to death row and thwarted post-conviction counsel's efforts to establish trial counsel's ineffectiveness in failing to investigate and present evidence of Norwood's sexual exploits against young boys, including Williams. Its concealment has also led Williams to spend an agonizing, nearly three-decade incarceration on Pennsylvania's death row in solitary confinement, under threat of execution. *See Glossip v. Gross*, 135 S. Ct. 2726, 2769-70 (2015) (Breyer, J., dissenting).

"When a defendant's life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (plurality opinion). Despite this Court's historical focus on reliability in capital sentencing, the type of prosecutorial misconduct that occurred here is more likely to occur in death penalty cases, as Justice Breyer pointed out last term. *See*

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[6] Had even one juror voted for life, Terry Williams would have been sentenced to life imprisonment. *See* 42 Pa. Cons. Stat. § 9711(c)(v).

Glossip, 135 S. Ct. at 2757-58 (Breyer, J., dissenting). That is because "the crimes at issue in capital cases are typically horrendous murders, and thus accompanied by intense community pressure on police, prosecutors, and jurors." *Id.* at 2757. In Williams's case, the prosecution was subject not only to these pressures, but the added pressure of having failed to secure a first-degree murder conviction in the Hamilton trial after the jury learned of his sexual exploitation of Williams. The prosecution responded to these pressures by concealing the truth. The prosecution's misconduct shattered safeguards at Williams's trial and shattered the safeguard of appellate review for decades. These gross due process violations, then reviewed by the very person who authorized the death penalty proceedings in the first place, cannot withstand scrutiny under the Eighth Amendment. *See Johnson*, 486 U.S. at 584.

II. Terry Williams's Trial Counsel Failed To Investigate And Present Extraordinarily Compelling Evidence In Mitigation.

Beyond the prosecution's concealment of evidence, the jury's death sentence against Terry Williams depends in no small part on the deplorable representation he received at trial.[7] Williams's trial

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[7] Unfortunately, in capital cases, this is all too common. *See generally* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worse Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (May 1994). *See also* American Bar Association, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE PENNSYLVANIA DEATH PENALTY ASSESSMENT REPORT 112 (Oct. 2007) ("Defense counsel competency is perhaps the most critical factor determining whether an individual will receive the death penalty.").

attorney failed to conduct any investigation into Williams's life history to present at the sentencing phase, in violation of his constitutional right to the effective assistance of counsel. *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (citing *Williams v. Taylor*, 529 U.S. 362, 396 (2000)); *Wiggins*, 539 U.S. at 524; *Rompilla v. Beard*, 545 U.S. 374, 393 (2005).

Here, too, the decades-long quest by the prosecution to hide the full picture of the offense and Norwood had an impact. In state-post conviction proceedings the Pennsylvania Supreme Court recognized that the limited evidence presented by defense counsel was "not compelling." *Williams*, 863 A.2d at 520. It nonetheless failed to find any constitutional violation because post-conviction counsel had not met his burden of demonstrating a reasonable probability that Williams would have received a life sentence. *Id.* As shown below, the uncovered but readily available evidence of Williams's brutal childhood standing alone should have entitled him to sentencing phase relief. *See, e.g.*, *Wiggins*, 539 U.S. at 535-36 (defense counsel's failure to uncover capital defendant's troubled background, including years of sexual molestation, warranted penalty phase reversal). But it is beyond question that the state courts would have viewed this evidence differently had it been combined with the hidden circumstances of the offense and Norwood's history of sexual violence. The State's concealment at trial denied Williams a fair trial, and its concealment throughout post-conviction proceedings denied him meaningful review in post-conviction. *Cf. Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) ("A prisoner's inability to present a claim of trial error is of

particular concern when the claim is one of ineffective assistance of counsel.").

Terry Williams met his sole trial attorney Nicholas Panarella for the first time the day before jury selection began.[8] Trial Tr. 15-16, 1/6/1986. The judge authorized $150 *total* for an investigator to assist him, but Panarella failed to make use of this paltry amount. Trial Tr. 33, 1/6/1986. He never retained any investigator to assist him in preparing for trial.[9]

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[8] Though Williams was housed out of county in order to segregate him from his co-defendant Marc Draper, the court arranged for Williams to be returned to the local jail for a 10-week period in the months before trial so that he could have more contact with counsel. It made no difference. Panarella still did not visit a single time. Trial Tr. 30, 1/6/1986.

[9] Panarella's poor representation is partly explained by the systemic crisis in capital representation in Philadelphia at the time of Williams's trial. At the time, Philadelphia capital defendants were almost always represented by a single attorney. Michael Kroll, Death Penalty Information Center, *Justice on the Cheap: the Philadelphia Story* (May 1992), *available at* http://www.deathpenaltyinfo.org/justice-on-the-cheap. Court-appointed attorneys were paid $40 an hour for out-of-court time, and $50 an hour for in-court time. *Id.* Even years after Williams's trial, the average total fee received by capital trial attorneys was a paltry $6,339. Fredric Tulsky, *What Price Justice? Poor Defendants Pay the Cost as Courts Save on Murder Trials*, PHILA. INQUIRER, Sept. 13, 1992. If a second chair was appointed – a rare occurrence – he or she would receive a $500 flat fee. *Id.* In a review of capital cases over a two-year period, the *Philadelphia Inquirer* found that investigators were not hired in the majority of cases, and the courts paid for psychologists in only two cases. *Id.* Over the same period, the District Attorney's office, under Ronald Castille's leadership, was ramping up its capital prosecutions. Kroll, *Justice on the Cheap*, *supra*. Indeed, in seeking a

Panarella had never tried a capital case to penalty before. Trial Tr. 15, 4/24/1987. He conducted effectively no investigation into the facts of the crime or into Williams's life history in preparation for the penalty phase, though he believed all along that Williams would be found guilty. Trial Tr. 20-21, 1/6/1986. His investigation into Williams's background consisted solely of speaking with Williams[10] and his mother Patricia Kemp. He relied on Kemp to bring in character witnesses and put

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judgeship on the Pennsylvania Supreme Court, Castille campaigned on his tough-on-crime record of sending 45 capital defendants to death row as Philadelphia's District Attorney, including Terry Williams. *See, e.g.*, Katharine Seelye, *Castille Keeps Cool in Court Run*, PHILA. INQUIRER, Apr. 30, 1993. As a result, Philadelphia defendants comprised more than 50% of the State's death row, though the county only accounted for 15% of the population. Kroll, *Justice on the Cheap*, *supra*. These gross systemic problems have led to the reversal of dozens of capital cases from Philadelphia. Nancy Phillips, *In Life and Death Cases, Costly Mistakes*, PHILA. INQUIRER, Oct. 23, 2011.

[10] While Williams of course knew of his own past dealings with Norwood and other men, it is no surprise that he would not have disclosed such deeply intimate and traumatic events to an attorney he barely knew. Even among trusting relationships, "young male victims of older male sexual abuse typically do not report such behavior and find it extremely difficult and painful to talk about it," as the state habeas court observed. JA 111a, n.50. Even current Philadelphia District Attorney Seth Williams has recently acknowledged this fact: "it is extremely difficult for sexual abuse victims to admit that the assault happened, and then to actually report the abuse to authorities can be even harder for them." Carl Rotenberg, *Former Upper Merion Priest Arrested*, KING OF PRUSSIA COURIER (Pa.), July 27, 2012. This is especially true for male victims. Matthew Mendel, THE MALE SURVIVOR: THE IMPACT OF SEXUAL ABUSE 6-7 (1995).

"everyone that came forward . . . on the stand." Trial Tr. 26, 4/24/1987.

Panarella offered only three witnesses on Williams's behalf: Williams's mother Patricia Kemp, his girlfriend Marlene Rogers, and his cousin Willie James. The sentencing phase was over in an afternoon.[11]

Panarella's poor preparation was evident in his questions to Kemp. Though Williams had been a star athlete, she could not remember what position he played (quarterback) or what year he graduated from high school. Trial Tr. 1848, 2/3/1986. Answering only Panarella's limited questions, Kemp offered the jury a cursory view of Williams's childhood: she had raised him and his two older half-siblings as a single mother. Panarella spent more time parading Williams's athletic trophies to the jury during her testimony. Trial Tr. 1848-52, 2/3/1986. Only on cross did it come out that Williams's stepfather had been abusive to Williams, his older sister, and herself, including one occasion where he pushed Williams down a flight of stairs. *Id.* at 1856-58.

In a direct examination constituting two pages in the record, Marlene Rogers testified simply that she loved Williams, that he supported her and was a sweet person, and that they have a child together. Trial Tr. 1859-61, 2/3/1986. Panarella appeared more concerned with making sure the jury had a chance to glimpse Rogers and Williams's child, rather than any

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[11] The entirety of defense testimony at sentencing, including cross-examination, spans less than 25 pages in the record. Trial Tr. 1846-70, 2/3/1986.

substance of her testimony. *Id.* at 1861-62, 1865-66, 2/3/1986.

Finally, his cousin Willie James gave a "rambling narrative, peppered with Biblical references," *Williams*, 863 A.2d at 520 n.11, about his experiences on the football team with Williams at Cheyney College during Williams's short stint there and ended his testimony by telling the jury that they should not kill Williams, else "Blood will be on your hands." Trial Tr. 1867-71, 2/3/1986. Even the Pennsylvania Supreme Court agreed Panarella's mitigation presentation was "not compelling." *Williams*, 863 A.2d at 520.

Panarella closed by reminding the jury of Williams's age (without giving them any reason why his youth mattered), emphasizing that he had a supportive family and a young child, and informing them that prison life would be brutal. Trial Tr. 1877-81, 2/3/1986. He had nothing to counter the prosecution's claims that Williams "had all kinds of advantages," and "could have made whatever he wanted out of his life" *Id.* at 1874-76.

His weak plea for mercy failed. The jury did not find a single mitigating circumstance in the case, not even Williams's youth. The jury returned the only available verdict to it when at least one aggravating circumstance and no mitigating circumstances are found: death. *See* 42 Pa. Cons. Stat. § 9711(c)(1)(iv).

In post-conviction proceedings, readily available evidence showed that Panarella never even scratched the surface of Williams's tragic childhood. Terry Williams never knew his father and was raised

by his mother on her own, in an environment of violence, terror, control, and humiliation. In wild fits of rage, Williams's mother would beat him and his older siblings with belts, her fists, extension cords, switches – anything she could get her hands on – for even the smallest transgression, or for no reason at all. PCRA Tr. 298, 4/9/1998. When Patricia would beat young Williams, he recalled, her face would go blank, "like she didn't know who you was or who she was." Lisak Decl. ¶ 19, PC Appendix, Tab 12. Williams's sister Theresa recalled some of the violence she experienced at her mother's hands:

> One time my mother poured hot boiling water on me when I was a toddler. I remember being in the hospital after my mother burnt me. The nurses would put white towels on the floor and try to help me walk. I would look behind me and see my own bloody footprints on the towels. For a long time after I got out of the hospital, layers of skin would peel off of my feet when my mother bathed me.

Fields Decl. ¶ 3, PC Ex. 3. Still, the hospital returned Theresa to live with her mother. Patricia's violence was accompanied by emotional abuse. She would tell Williams that he was going to turn out to be a "fucking faggot" like his father. Rahaman Decl. ¶ 7, PC Appendix, Tab 7.

Patricia was not deterred in public. On one occasion, after a meeting at school, Williams told his mother that the teacher had lied about something. Patricia flew into a rage, chasing Williams down a flight of stairs, "wailing on him as hard as she could,

. . . beating him on the head and back as he tried to get away from her." *Id.* at ¶ 4. Williams "had his harms over his head trying to protect himself and begging her to stop." *Id.* His classmate recalls: "I think the most horrifying part of this was the trail of blood that was following Terry." *Id.*

On another occasion, a teacher called Patricia to school because Williams had talked back to her. Lisak Decl. ¶ 16, PC Appendix, Tab 12. After the teacher told Patricia what had happened, Patricia started punching Williams in the face. She bruised his face and bloodied his nose. Patricia only stopped after Williams's teacher began screaming in horror. Williams's teacher promised him the next day that she would never call his mother to school again. *Id.*

The violence in the home escalated when Patricia married Ernest Kemp, a violent alcoholic, when Williams was 10 years old. Williams's older siblings were able to flee the family home not long after Ernest arrived, but younger Terry had no escape. Patricia and Ernest fought violently and constantly. They would beat each other with baseball bats and tire irons. Patricia recalled that "[t]he fighting was so bad that the kids never wanted to stay home. . . . My children and I had to be on guard every second. . . . After years of abuse, I finally learned to protect myself with a bat. I kept the bat by my bed at all times to protect myself." Kemp Decl. ¶ 11, PC Ex. 2. One time, Patricia ended up in the hospital, after Ernest beat her on the head with the tire iron. She needed 12 stitches. When she returned from the hospital, she "smashed a frozen steak into Ernest's head, knocking out two teeth." *Id.*; Lisak Decl. ¶ 26, PC Appendix, Tab 12.

Patricia would often leave the home for weeks at a time, leaving Williams alone to Ernest's violent rage. Ernest would attack Williams if he tried to intervene to help his mother. But he would also attack Williams in his mother's absence. Williams would try to hide in his room, but Ernest would break down the door. On one occasion, Ernest pointed a rifle at Williams's head and threatened to kill him. Lisak Decl. ¶ 25, PC Appendix, Tab 12.

Patricia's – and later Ernest's – extreme violence[12] against Williams left him emotionally scarred and humiliated. Tragically, it also made him vulnerable to sexual predators.[13] When he was only 6 years old, he was sodomized by his neighbor Peter Robinson, who Terry considered an older brother. Robinson had lured Williams to his house, with the promise of watching cartoons and making food for him.

Williams came home crying, telling his mother that "his behind hurt," and that Robinson had hurt him. PCRA Tr. 193-94, 4/8/1998. Williams was

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[12] One psychologist who later evaluated Terry described the violence against him as "truly some of the most harsh that [she'd] ever seen," even among the thousands of victims of abuse she had interacted with throughout her career. PCRA Tr. 323, 4/9/1998.

[13] *See, e.g.*, Stop It Now!, *Understanding What Makes Kids Vulnerable to Sexual Abuse*, available at http://www.stopitnow.org/ohc-content/understanding-what-makes-kids-vulnerable-to-being-sexually-abused (last visited December 2, 2015) (listing risk factors such as the child being a victim of physical or emotional abuse; domestic violence in the home; a weak or absent ongoing connection to a trusted safe adult; child feeling emotionally isolated or neglected; alcohol abuse in the home).

bleeding from the rectum, yet Patricia failed to seek medical treatment, or counseling, for him. Robinson raped Williams once more, after luring him to his house to eat cupcakes. Williams avoided being alone with Robinson after the second time, but these experiences left him "profoundly scarred, not only by the painful and violent rape, not only by the assault on his fragile sense of himself as a boy, but also because he had trusted Robinson and his trust had been cruelly betrayed." Lisak Decl. ¶ 41, PC Appendix, Tab 12.

The sexual violence continued against Williams when he was in middle school. His teacher, Timothy Johnson, sensed that Williams had a difficult home life and offered to help him. Lisak Decl. ¶ 49, PC Appendix, Tab 12. He began to shower William with gifts and attention. Williams thought that Johnson was the adult male figure he craved, but instead Johnson began to sexually abuse him. Williams was uncomfortable at first but then began to think he owed Johnson for all of his assistance. Lisak Decl. ¶ 51, PC Appendix, Tab 12. As the abuse continued, Johnson would tell Williams how much he loved him and that he would give Williams anything he needed. Around this time, friends and neighbors began to sense that something was severely wrong with Williams. Rogers Decl. ¶¶ 2, 4, 5, PC Ex. 8. He seemed damaged, confused, and extremely paranoid. *Id.* at ¶ 7; Cruse Decl. ¶ 11, PC Ex. 5; Robinson Decl. ¶ 10, PC Ex. 7.

The sexual violence against Williams continued when he was ordered to a juvenile detention center as a result of his involvement in a

burglary. Lisak Decl. ¶ 61, PC Appendix, Tab 12. At the center, he was gang-raped by two older males. *Id.*

The extensive trauma Williams experienced throughout his young life from an early age had a devastating impact on him. It left him confused, ashamed, and alone. It destroyed his sense of self-worth and manhood. To numb his pain, Williams started self-medicating with alcohol and drugs. He also began to hurt himself. On one occasion, Patricia found her son banging his head repeatedly against a wall saying, "I'm tired, I don't want to be here no more." PCRA Tr. 204, 4/8/1998. His high school girlfriend also witnessed another incident of self-mutilation:

> Terry completely lost control and started to bang his head against the wall and off the concrete outside. He banged his head violently against the wall. He banged his head so hard that he was taken to the hospital . . . The doctor told [Terry's mother] Pat that Terry needed psychiatric help but Pat never followed through with the doctors [sic] instructions.

Cruse Decl. ¶ 14, PC Ex. 5.

Amos Norwood was a middle-aged sexual predator who preyed on teenage boys like Terry Williams. PCRA Tr. 227-33, 4/8/1998; *Id.* at 602-604. 4/13/1998; Poindexter Decl. ¶¶ 6, 7, 12, 13, 15, PC Appendix, Tab 10; Lisak Decl. ¶ 76, PC Appendix, Tab 12. *See also* JA 92a, n.41. In exchange for sex, he would give the boys money, food, housing, and other gifts. Williams first met Norwood as a young

teenager, about 13 years old. Norwood approached Williams at a deli and told him he owned a modeling business and could get Williams some jobs. Lisak Decl. ¶ 90, PC Appendix, Tab 12. When Williams met privately with Norwood two days later, he learned that there were no modeling jobs. Norwood offered him money for sex instead. Williams obliged. *Id.* The next time Norwood encountered Williams, he again paid him for sex. But this time, Norwood took out a whip and started to beat Williams. Norwood continued to attack Williams, even as pleaded with him to stop. *Id.* at ¶ 94. The violence intensified as their meetings continued. Norwood would give Williams extra money when their encounters became especially violent. *Id.* at ¶ 96.

In the months before Norwood's murder, Williams's anger against Norwood, Hamilton, Johnson, Robinson and all the men who had raped, assaulted, and exploited him over the years was intensifying. On the night before Norwood was killed, Norwood drove Williams to an unlit parking lot surrounded by woods for another sexual encounter.

> He made me lean against his car and he penetrated me from behind . . . . I felt hurt and mad because he was rough with me that night. He forced himself into me. I told him to stop. He kept on. I was clenching my anus so tight trying to stop him but he wouldn't stop and it hurt so bad I screamed.

Id. at ¶ 98. Williams saw blood stains on his underwear that night and was still in pain the next day. *Id.* In his next encounter with Norwood, the following day, Williams could not take it anymore

and "snapped." *Id.*; Draper Decl. ¶ 3, PC Appendix, Tab 14.

All of this information was at trial counsel's fingertips. Had counsel bothered to conduct even a minimal investigation into Williams's background, he would have discovered a wealth of information to use in mitigation. Records from his previous juvenile trials would have led counsel to discover that Ernest Kemp was a "heavy drinker' who would "smack Terrance's mother around in years past, something that, of course, angered young Terrance." Memorandum at 76, *Williams*, No. 05-cv-3486 (E.D. Pa. May 8, 2007) (quoting Respondents' Exhibit II). Williams's juvenile records would have likewise detailed Ernest Kemp's drunken beatings against Williams's mother. *Id.*

Most notably, readily available court records from the Hamilton trial would have alerted counsel to Williams's deteriorating mental state and Hamilton's sexual exploitation of Williams. *See, e.g., State v. Williams,* Nos. 797-801 (Sept. term 1984), Philadelphia County Court of Common Pleas, Trial Tr. 30, 2/14/1985; 156, 186-87, 2/15/1985. A court-ordered mental health examination conducted prior to trial by psychologist Dr. Edwin Camiel noted, among other things, that Terry "appeared to be developing a paranoid delusional system," sleep disturbances, anxiety, impulsivity, and "somewhat impaired" judgment. Dr. Camiel found that "the clinical picture is consistent with a diagnosis of Schizophreniform Disorder or a briefly active psychosis second to the stress of his present incarceration." Dr. Edward Camiel Report, PC

Appendix, Tab 1. Dr. Camiel recommended immediate mental health treatment. *Id.*

Counsel's failure to obtain these records was inexcusable and constitutionally ineffective. *Rompilla*, 545 U.S. at 389-90 (counsel's performance was deficient when he had failed to obtain the defendant's prior conviction records that could have led to numerous leads on mitigation evidence).

What's more, Panarella failed to make use of the information he did have. For instance, in his sentencing closing argument, Panarella glossed over Williams's youth – an extremely compelling mitigating circumstance that was completely lost on the jury. *See* Stephen Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 Colum. L. Rev. 1538, 1564 (1998) (a defendant's youth is "significantly mitigating" to capital jurors); *see also Roberts v. Louisiana*, 431 U.S. 633, 637 (1977) (a defendant's youth is an example of a mitigating factor). Terry turned 18 years old on February 27, 1966, a mere three months before Norwood's murder. Counsel made no attempt to explain why Williams's youth meant that he was more likely to react with impulsivity and recklessness in response to the horrific trauma and sexual exploitation he suffered. *Cf. Roper v. Simmons*, 543 U.S. 551, 569-70 (2005) (explaining that juveniles' immaturity, susceptibility to peer pressure, and still unformed character place them outside the worst offenders . . . striking death penalty as unconstitutional sentence for those under

18 years old due, in part, to their lessened culpability).[14]

As discussed *supra*, had Williams's jury known about his victimization at Norwood's hands, there is a reasonable probability it would have not have returned a death sentence against him. Here, in fact, there is far more than a reasonable probability, but a near certainty: at least five jurors would have voted for life if they had known that Terry had been the victim of Norwood's sexual predation, the horrific sexual abuse he suffered as a child, and the psychological impact on him.[15] Juror Decls., PC Appendix, Tabs 19-23.

No decision maker in this case before 2012 had the full picture of Terry William's history of physical and sexual violence, and its direct link to the offense. The mitigation evidence never investigated or presented by trial counsel, when combined with the mitigating circumstances of the crime, would have cast both the crime and the serious prior homicide aggravator in a different light and presented a powerful basis for jurors to choose life. Terry Williams was never able to establish counsel's horrendous performance in this capital case because the prosecution suppressed for more than 20 years

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[14] Of course, these "qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574.

[15] Several jurors mistakenly believed that a life sentence meant that Williams would later become eligible for release on parole. These jurors would have voted for life had they known that a life sentence meant life without the possibility of parole. Pagano Decl. ¶ 6, Brown Decl. ¶ 2, Moss Decl. ¶ 2, PC Appendix, Tabs 19- 21.

evidence that would have wholly changed the outcome of his capital proceedings – a prosecution authorized in the first instance by District Attorney Ronald Castille and a prosecution Castille boastfully touted in seeking election to the Pennsylvania Supreme Court. Chief Justice Castille's subsequent participation as a jurist in Williams's appeal thus cannot meet the rigorous demands of heightened reliability required under the Eighth Amendment. *Johnson*, 486 U.S. at 584.

CONCLUSION

For the reasons stated above and in Petitioner's brief, this Court should vacate the judgment of the Pennsylvania Supreme Court and remand the case to that Court to conduct a *de novo* review without the participation of Chief Justice Castille.

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No. 15-5040

IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR *AMICI CURIAE* BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AND JUSTICE AT STAKE IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*

Amicus curiae Brennan Center for Justice at NYU School of Law is a non-profit, nonpartisan public policy and law institute that, among other things, advocates for fair and impartial courts as guarantors of liberty in our constitutional system.[1]

Amicus curiae Justice at Stake is a nonprofit, nonpartisan national partnership of more than fifty organizations that focuses exclusively on keeping courts fair and impartial through public education, litigation, and reform.

Amici have an interest in this case because of its exceptional importance in protecting judicial impartiality.

SUMMARY OF ARGUMENT

For the reasons stated by Petitioner, it is apparent that he was denied his due process right to a fair and impartial tribunal when Chief Justice Castille failed to recuse. *Amici* write separately to draw the Court's attention to one of the circumstances that contributed materially to the denial of Petitioner's due process rights: the absence of procedures in Pennsylvania for independent review of the justice's recusal decision. Because an objective review of the justice's decision would almost certainly have resulted in recusal, the

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[1] Under Rule 37.3(a) of the Rules of this Court, the parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief. This brief does not purport to convey the position of NYU School of Law.

circumstances here illustrate graphically the importance of procedures for independent review of decisions as to recusal.

This Court has held that the due process test for recusal is objective: whether, based on objective and reasonable perceptions, there is a serious risk of actual bias. Compliance with that standard is best assured when there is an independent review of the recusal decision by an objective party.

The importance of adequate procedures to ensure the fairness of a tribunal is embedded in this Court's precedents. The need for a procedure ensuring independent review under the circumstances presented in this case is supported by the history of recusal law and procedures and social science literature. There are instances where necessity precludes independent review but when there is no such compelling need independent review of recusal decisions should be provided.

This Court has long recognized that inadequacies in the *procedures* used to select a tribunal may unconstitutionally contribute to both the risk of actual bias, and the perception of bias. To promote fairness, the federal government and numerous States have adopted procedures that require recusal motions to be heard or reviewed by a judge other than the subject of the motion. This trend reflects a growing recognition that shielding recusal decisions from independent review significantly increases the risk that a party will face a biased decisionmaker and that there will be a perception of bias.

Social science literature from the last several decades further supports the need for independent review of recusal decisions. Among the forms of cognitive bias

recognized by social scientists is "egocentric" or "self-serving" bias, the tendency of individuals to overestimate their competence relative to others. Driven by such bias, judges are likely to believe that their judgments are less susceptible to other biases than those of other similarly situated judges. Egocentric bias can also cause judges to ignore or rationalize facts or ideas that threaten to undermine their preexisting self-image, which, for them, is often one of being necessarily impartial. The social science literature thus affords ample support for the fundamental precept of due process that "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955).

ARGUMENT

I. THE ABSENCE OF PROCEDURES FOR SEEKING INDEPENDENT REVIEW OF CHIEF JUSTICE CASTILLE'S FAILURE TO RECUSE WAS AN IMPORTANT CIRCUMSTANCE THAT CONTRIBUTED TO THE DENIAL OF DUE PROCESS.

A. Due Process Analysis Requires Considering All of the Circumstances Relevant to Whether a Party Faced a Biased Tribunal.

This Court has held that all relevant circumstances "must be considered" when deciding whether a party was denied due process because the decisionmaker was biased or appeared to be. *Murchison*, 349 U.S. at 136; *see also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (finding that due process required recusal based on "all the circumstances of this case"); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821–25 (1986) (considering the challenged judge's

interest and involvement in the case as a whole and accounting for various factors bearing on the risk of bias).

As Petitioner demonstrates, the circumstances here compel the conclusion that Chief Justice Castille's denial of Petitioner's recusal motion violated due process: (1) Chief Justice Castille served as the Philadelphia District Attorney at the time of Petitioner's trial; (2) Chief Justice Castille substantially participated in Petitioner's prosecution by making the decision to seek the death penalty; (3) the decision being appealed vacated Petitioner's death sentence based on findings that the trial prosecutor, who was supervised by Chief Justice Castille, violated *Brady v. Maryland*, 373 U.S. 83 (1963), by withholding exculpatory evidence; and (4) during his judicial campaign Chief Justice Castille touted his prosecutorial record of having sent forty-five people, including Petitioner, to death row.

An additional important circumstance that contributed to the denial of due process was the fact that Pennsylvania—unlike many other States—had no procedure for independent review of recusal decisions. Fourteen States have implemented procedures that either require motions to recuse judges on a state's highest court to be heard by a judge other than the subject of the motion, or provide a mechanism for independent review of recusal decisions. In contrast, Pennsylvania Supreme Court justices are free to decide motions seeking their own recusal, thereby shielding rulings on those motions from any form of independent review aside from the entirely discretionary review by this Court for constitutional infirmities. This Court's precedents, the historical development of judicial recusal law and procedures, and social science research on biases all compel the conclusion that the risk of facing

a biased tribunal in judicial proceedings increases substantially when, as in Pennsylvania, recusal decisions are not subject to independent review.

B. Inadequate Procedures for Selecting a Tribunal Significantly Enhance the Risk That a Party Will Face a Biased Decisionmaker.

Inadequacies in *procedures* for selecting a tribunal that will determine whether or not a defendant is guilty can deprive the defendant of due process by increasing the risk that the defendant will appear before a tribunal that is actually biased, as well as increasing the perception of bias. In *Peters v. Kiff*, 407 U.S. 493 (1972), this Court held that a defendant had the right to challenge his conviction on due process grounds based on deficiencies inherent in the procedures used to select the grand jury that indicted him.[2] Those procedures allegedly allowed the prosecutor to exclude all African-Americans from the jury pool on the basis of race. Although no single opinion was joined by a majority of the justices, six justices agreed that due process barred procedures that had the effect of excluding all

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[2] Because the Fifth Amendment right to a grand jury does not apply in a state prosecution, the Court relied on the "general Fourteenth Amendment guarantees of due process" in finding that petitioner's constitutional rights had been violated. *See Peters*, 407 U.S. at 496 (plurality opinion) (citing *Hurtado v. California*, 110 U.S. 516 (1884)). Likewise, although the plurality opinion found that petitioner was also entitled to challenge the procedures used to select the petit jury that convicted him, it did not rely upon the Sixth Amendment right to a petit jury because that right was found not to apply to state trials that took place before the decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968). *See Peters*, 407 U.S. at 496 (plurality opinion) (citing *DeStefano v. Woods*, 392 U.S. 631 (1968)).

members of a particular race from the grand jury. The opinion announcing the judgment explained that such procedures violated due process because they would "create the appearance of bias in the decisions of individual cases, and they increase the risk of actual bias as well." *Id.* at 503.

The need for adequate procedures to ensure that judges are unbiased, tailored to the circumstances of potential judicial bias, is no less significant than the need for procedures to ensure a fair and unbiased jury.[3]

C. The Development of Recusal Law and Procedures Demonstrates a Growing Recognition of the Importance of Independent Review.

The historical development of recusal rules, as well as the development of procedures for assuring compliance with those rules, reflects the widespread recognition that both adequate substantive rules and

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[3] *Amici* recognize that independent review of recusal decisions is not possible in all circumstances: there will be times when there are no other judges available to review the recusal motion and in such circumstances the lack of independent review would be excused due to the rule of necessity. *See, e.g.*, *United States v. Will*, 449 U.S. 200, 214 (1980) (discussing the long history of the rule of necessity, in both state and federal courts, which holds that "wherever it becomes necessary for a judge to sit even where he has an interest—where no provision is made for calling another in, or where no one else can take his place—it is his duty to hear and decide, however disagreeable it may be" (quoting *Philadelphia v. Fox*, 64 Pa. 169, 185 (1870) (internal quotation marks omitted))). However, our modern judicial system is far removed from the realities of lone circuit riders, and there are many options available to both federal and state judges to ensure that an independent judge will almost always be available to hear recusal motions.

procedures are important to avoiding both the reality and perception of bias.

Rules intended to ensure the impartiality of judicial actors existed in precursors to the common law as far back as the third century. Although the Roman Code of Justinian permitted a party to "recuse" a judge who was "under suspicion" of bias,[4] the English common law that developed in the sixteenth and seventeenth centuries did not initially go that far, instead requiring recusal only when a judge's pecuniary interest in the case made it probable that the judge could not be fair.[5] Over time, the English common law came to require disqualification for more remote pecuniary interests and, by the mid-nineteenth century, came to require recusal when a judge had an "interest" creating a "real likelihood" of bias against one of the parties.[6]

The development of the law of judicial disqualification in the United States mirrored its development in England. The law of the pre-Revolutionary American colonies required disqualification when the judge had a pecuniary interest in a case,[7] but the circumstances requiring recusal have consistently expanded since then, especially in the twentieth century. On the federal side, Congress passed the first judicial disqualification statute in 1792. It authorized disqualification when the challenged judge was "concerned in interest"

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[4] Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges* § 1.2, at 5 (2d ed. 2007).

[5] *See* Dr. Bonham's Case, 77 Eng. Rep. 638, 8 Co. 114a (K.B. 1608); Flamm, *supra* note 4, § 1.2, at 6 n.7.

[6] Flamm, *supra* note 4, § 1.4, at 8 & n.3.

[7] *Id.* § 1.4, at 8.

or had been "of counsel."[8] The statute has since been amended five times, and in each instance Congress expanded the grounds for disqualification.[9]

Commentators have embraced the trend and called for further expansion. Through the promulgation of statutes or court rules, States have generally followed suit by expanding their own list of circumstances in which

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[8] Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278.

[9] Flamm, *supra* note 4, § 1.4, at 9 (listing the acts and explaining their significance); *see also* John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. Rev. 237, 246 n.47 (1987). The initial act, passed in 1792, provided that a judge could be disqualified if he or she was "concerned in interest" or had been of counsel. Act of May 8, 1792, ch. 36, § 11, 1 Stat. 278. In 1821, Congress expanded the grounds for disqualification to include when the challenged judge was related to or connected with a party as to render it improper in the judge's opinion to sit. Act of Mar. 3, 1821, ch. 51, 3 Stat. 643. In 1891, the statute was amended to include the situation when a challenged judge had previously tried a matter. Act of Mar. 3, 1891, ch. 517, § 3, 26 Stat. 826. In 1911, Congress expanded the statute again to make any "personal bias or prejudice" a basis for recusal. Act of Mar. 3, 1911, ch. 23, § 21, 36 Stat. 1090. In 1948, Congress extended the reach of these grounds for disqualification to include appellate judges. Act of June 25, 1948, ch. 646, § 455, 62 Stat. 908. Finally, in 1974, Congress broadened the grounds for recusal to allow litigants to challenge judges whose "impartiality might reasonably be questioned." Act of Dec. 5, 1974, Pub. L. No. 93-512, 88 Stat. 1609. In this last amendment, Congress also clarified situations in which this might be the case including, but not limited to, when the judge has personal knowledge of disputed evidentiary facts, has certain past connections with the case or with a party's lawyer, or when the judge or his family have an interest that could be substantially affected by the outcome of the proceeding. The current version is codified as amended at 28 U.S.C. §§ 47, 144, 455.

disqualification is required.[10] Modern disqualification standards now encompass a range of recognized biases, potential and perceived, that go well beyond merely having a financial interest in a matter.[11]

As the list of circumstances in which judicial recusal is considered necessary has grown, there has been a parallel and related evolution of procedures for the independent review of recusal motions. In 1948, Congress enacted a provision requiring that recusal motions for district court judges be heard by a judge other than the subject of the motion.[12] Since that time, at least twenty-two States have adopted various procedures to ensure that recusal motions are decided or may be reviewed by a judge or justice other than the subject of the motion.[13] In several States, once the

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[10] Leubsdorf, *supra* note 9, at 246–47.

[11] 28 U.S.C. §§ 144, 455.

[12] *Id.* § 144. *Amici* recognize that Section 144 does not apply to this Court, and note that this Court has developed its own methods for addressing ethical questions related to recusal. Chief Justice John Roberts, *2011 Year-End Report on the Federal Judiciary* 7-9 (2011).

[13] *See, e.g.*, Alaska Stat. § 22.20.020(c); Ariz. R. Civ. P. 42(f)(2)(D); Ariz. R. Crim. P. 10.1; Cal. Code Civ. P. § 170.3(c)(1)–(6); Ga. Unif. Super. Ct. R. 25.4; Ga. Unif. Mag. Ct. R. 4.2.4; Ill. Comp. Stat. Ann. art. 735, tit. 5/2-1001(a)(3)(iii); Kans. Stat. Ann. § 20-311d; Ky. Rev. Stat. Ann. §§ 26A.015, .020; La. Code Civ. P. art. 155, 160; Mich. Ct. R. 2.003(D)(3)(a); Miss. Unif. Cir. & Cty. Ct. Prac. R. 1.15; Miss. R. App. P. 48B; Mont. Code § 3-1-805; Nev. Rev. Stat. Ann. § 1.235(5); Ohio Rev. Code Ann. §§ 2501.13, 2701.03; Okla. Dist. Ct. R. 15(a)–(c); Okla. Sup. Ct. R. 1.175; Or. Rev. Stat. Ann. §§ 14.250, .260; S.D. Codified L. Ann. §§ 15-12-21 to -23; Tenn. Sup. Ct. R. 10B, § 2.01–.07; Tex. R. Civ. P. 18a(f)–(g)(1); Utah R. Civ. P. 63(b)(1)(A), (b)(2), (b)(3)(A); Utah R. Crim. P. 29(c); Vt. R. Civ. P. 40(e)(3); Vt. R. Crim. P 50(d); W. Va. Trial Ct. R. 17.01(b). Judges in at least one other state abide by informal procedures that are considered well-established, though

motion is made, it is considered in the first instance by another judge.[14] In other States, the challenged judge passes only on whether the recusal motion is "legally sufficient," and whether it is timely made. The substantive decision concerning recusal is left entirely to the discretion of another judge.[15] In still other States,

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not codified. *See, e.g., State v. Poole*, 289 S.E.2d 335, 343 (N.C. 1982) ("[I]t is well-established in this jurisdiction that a trial judge should either recuse himself or refer a recusal motion to another judge if there is 'sufficient force' in the allegations contained in defendant's motion to proceed to find facts.").

[14] *See, e.g.*, Ill. Comp. Stat. Ann. art. 735, tit. 5/2-1001(a)(3)(iii) (providing that a hearing on a motion to recuse "for cause" shall be conducted by a judge other than the judge named in the motion); La. Code Civ. P. art. 155 (providing that a motion to recuse in a district court will be randomly assigned to another judge); *id.* art. 160 (providing that a motion to recuse a judge on a court of appeal will be tried by the other judges on that court); Mont. Code § 3-1-805 (providing that a motion to recuse a district court judge is immediately referred to the chief justice of the Montana Supreme Court, whereas a motion to recuse a lower court judge is immediately referred to the presiding district court judge in the district of the court involved to assign a new judge to hear the matter); Ohio Rev. Code Ann. § 2701.03(E) (requiring the chief justice of the Ohio Supreme Court, or another supreme court justice designated by the chief justice, to determine whether the alleged bias exists, in which case the original judge is disqualified from proceeding and another judge (or a retired judge) is randomly assigned to the matter).

[15] *See, e.g.*, Ga. Unif. Super. Ct. R. 25.3; *id.* 25.4 (providing that an impugned judge assesses whether a motion to recuse is factually sufficient and timely in the first instance and, if it is, the motion is assigned to another judge for hearing); Utah R. Civ. P. 63(b)(1)(A), (b)(2), (b)(3)(A); Utah R. Crim. P. 29(c) (requiring the reviewing judge to assign a recusal motion to another judge if he or she determines the motion and accompanying affidavit are timely filed, filed in good faith, and legally sufficient); W. Va. Trial Ct. R. 17.01(b), (e) (requiring immediate transfer of timely recusal motions to the chief justice of the West Virginia Supreme

the procedures require judges to issue a written decision explaining the grounds for any denial of a recusal motion, which is then appealable to an independent judge.[16] At least two States have enacted provisions that allow litigants to peremptorily challenge a judge assigned to their case premised exclusively on allegations of bias.[17] Several other States offer litigants the ability to peremptorily dismiss a judge without cause.[18]

At least fourteen States currently have procedures that provide independent review of a motion to recuse a judge of the highest court in the State.[19] Although

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Court, accompanied by a letter containing the impugned judge's response to the motion, whereupon the chief justice may appoint another judge to matter).

[16] *See, e.g.*, Nev. Rev. Stat. Ann. § 1.235(5) (providing that an impugned judge's denial of a recusal motion be made in writing); S.D. Codified L. Ann. § 15-12-21.1 (same); Tenn. Sup. Ct. R. 10B, § 4.03 (same).

[17] *See, e.g.*, Haw. Rev. Stat. § 601-7(b) (providing that an impugned judge will be disqualified from hearing the recusal motion if the movant files an affidavit attesting to that judge's bias); Wash. Rev. Code. § 4.12.040 (providing that an impugned judge shall be disqualified from hearing both the recusal motion and underlying merits of a case if the movant files an affidavit attesting to that judge's prejudice).

[18] *See, e.g.*, Alaska Stat. § 22.20.022; Ariz. R. Civ. P. 42(f)(1); Ariz. R. Crim. P. 10.2; Cal. Code Civ. P § 170.6(2); Idaho R. Civ. P. 40(d)(1); Ill. Comp. Stat. Ann. art. 735, tit. 5/2-1001(a)(2); Ind. Trial R. 76(B); Minn. R. Civ. P. 63.03; Mo. Sup. Ct. R. 51.05(a); Mont. Code § 3-1-804; Nev. Sup. Ct. R. 48.1; N.M. Stat. Ann. § 38-3-9; N.D. Century Code § 29-15-21; Wisc. Stat. Ann. §§ 801.58, 971.20; Wy. R. Civ. P. 40.1(b).

[19] *See, e.g.*, Alaska Stat. § 22.20.020(c); Cal. Code Civ. P. § 170.3(c)(1)–(5); Ga. Sup. Ct. R. 26, 57; Ky. Rev. Stat. Ann. §§ 26A.015, .020; La. Code Civ. P. Ann. art. 159; Mich. Ct. R. 2.003(D)(3)(b); Miss. R. App. P. 48C(a)(iii); Nev. Rev. Stat. Ann. § 1.225(4); Or. R. App. P. 8.30(3); S.D. Codified L. Ann. §§ 15-12-

the procedures vary from State to State, they all provide litigants with a mechanism for seeking independent review of a judge or justice's decision not to recuse. In several States, recusal motions are either automatically forwarded to the whole court, or one or more of the remaining judges on the court review the motion when recusal is denied. The court may proceed without the challenged judge in the event he or she is disqualified.[20] In other States, the challenged judge "certifies" the matter at the outset for decision by other members of the court.[21] In still others, the matter is referred to the chief judge of the highest court, who may decide the motion or, at his or her discretion, place the motion before the remaining judges.[22] Several States also provide for the appointment of replacement judges to restore a quorum.[23]

Following this Court's 2009 decision in *Caperton*, which reaffirmed that the test for determining when due process requires recusal is objective and acknowledged "[t]he difficulties of inquiring into actual bias and the fact that the inquiry is often a private one," *Caperton*, 556 U.S. at 883, two more

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21.1, -12-32, -24-1; Tenn. Sup. Ct. R. 10B, § 3.03; Tex. R. App. P. 16.3; Utah R. Civ. P. 63(b)(1)(A), (b)(2), (b)(3)(A); Utah R. Civ. P. 1; Vt. R. App. P. 27.1(b).

[20] *See, e.g.*, Alaska Stat. § 22.20.020(c); La. Code Civ. P. Ann. art. 159; Cal. Code Civ. P. § 170.3(c)(5); Mich. Ct. R. 2.003(D)(3)(b); Tenn. Sup. Ct. R. 10B, § 3.03; Miss. R. App. P. 48C(a)(iii); Nev. Rev. Stat. Ann. § 1.225(4).

[21] *See, e.g.*, Tex. R. App. P. 16.3(b); Tex. Gov't Code Ann. § 22.005; Utah R. Civ. P. 63(b)(2); Vt. R. App. P. 27.1(b).

[22] *See, e.g.*, Ky. Rev. Stat. Ann. § 26A.015(3)(a); Or. R. App. P. 8.30(3)(b).

[23] *See, e.g.*, Ga. Sup. Ct. R. 57; Ky. Rev. Stat. Ann. § 26A.020(1); Vt. R. App. P. 27.1(b); Vt. Stat. Ann. tit. 4., § 22.

States—Michigan and Tennessee—have implemented procedures for seeking independent review of recusal decisions made by justices of each State's supreme court. In Michigan, the decision to create those procedures was specifically linked to this Court's decision in *Caperton*. In an opinion concurring in the adoption of the amended court rule concerning the disqualification of judges, Chief Justice Marilyn Jean Kelly of the Michigan Supreme Court emphasized that she understood *Caperton* to mean that "an independent inquiry into a challenged justices' refusal to recuse may be necessary to satisfy due process because the independent inquiry makes possible an objective decision." Order Adopting Amendment of MCR 2.003 (Mich. Nov. 25, 2009) (Kelly, C.J., concurring).

National organizations of judges and attorneys have also begun advocating for recusal procedures that include independent review because of concerns that the absence of such procedures increases the risk of actual bias, as well as the perception of bias. In January 2014, the National Conference of Chief Justices adopted Resolution 8, which urged members to "establish procedures that incorporate a transparent, timely, and independent review for determining a party's motion for judicial disqualification/recusal."[24] And the American Bar Association ("ABA") has issued multiple resolutions concerning recusal procedures, including an August 2011 resolution recommending that States implement rules encouraging the filing of

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[24] Conference of Chief Justices, Resolution 8: Urging Adoption of Procedures for Deciding Judicial Disqualification/Recusal Motions: Ensuring a Fair and Impartial Process (adopted Jan. 29, 2014), *available at* http://ccj.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/01292014-Urging-Adoption-Procedures-Deciding-Judicial-Disqualification-Recusal-Motions.ashx.

written explanations of denied recusal motions,[25] and an August 2014 resolution urging States to adopt independent review procedures for recusal motions and to provide guidance and training to judges in deciding recusal motions.[26]

D. Decades of Scientific Research Confirms the Increased Risk of Bias When Judges Are the Sole Arbiters of Whether to Recuse Themselves.

The growing trend to provide procedures through which litigants may seek independent review of recusal decisions is consistent with decades of social science research demonstrating the pervasiveness of cognitive biases.[27] All individuals rely on such biases, or "heuristics," to help them absorb and interpret

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[25] A.B.A. Standing Comm. on Judicial Independence, Report to the House of Delegates on Resolution 107, at 11 (revised July 22, 2011) (adopted Aug. 8–9, 2011), *available at* www.americanbar.org/content/dam/aba/administrative/judicial_independence/report107_judicial_disqualification.authcheckdam.pdf.

[26] A.B.A. Standing Comm. on Judicial Independence, Resolution 105C (adopted Aug. 11–12, 2014), *available at* www.americanbar.org/content/dam/aba/images/abanews/2014am_hodres/105c.pdf.

[27] In their foundational article on the subject, Professors Jolls, Sunstein, and Thaler propose a new model for understanding legal decision-making, proceeding from the baseline principle that all "[p]eople display bounded rationality, bounded willpower, and bounded self-interest." Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1476 (1998). Such departures from perfect rationality are highly predictable. *Id.* at 1477 (citing Daniel Kahneman & Amos Tversky, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1224 (1974) (finding that people rely on mental shortcuts and rules of thumb to facilitate cognition, often leading to erroneous but predictable conclusions)).

information, creating order from the undifferentiated mass of data that they encounter every day.[28] But those same mental shortcuts that allow people to quickly process large quantities of information also cause them to make significant cognitive errors.[29]

One frequently observed cognitive error is the strong tendency to see oneself and one's conduct in the best possible light. Social scientists describe such bias as "egocentric" or "self-serving," referring to the tendency of individuals to overestimate their competence relative to others.[30] As psychologist Emily Pronin explains:

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[28] *Id.* at 1477 ("We have limited computational skills and seriously flawed memories. People can respond sensibly to these failings; thus it might be said that people sometimes respond rationally to their own cognitive limitations, minimizing the sum of decision costs and error costs."); *see also* Keith J. Holyoak & Richard E. Nisbett, *Induction, in* The Human Psychology of Thought 50, 55 (Robert J. Sternberg & Edward E. Smith eds., 1988).

[29] *See, e.g.*, Dan Simon, *A Psychological Model of Judicial Decision Making*, 30 Rutgers L.J. 1, 20 (1998) (noting the tendency "[d]uring the course of deciding a hard case, [for a] judge's mental representation of the dispute [to] evolve[] naturally towards a state of coherence").

[30] David M. Messick et al., *Why We Are Fairer Than Others*, 21 J. Experimental Soc. Psychol. 480 (1985); Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 Trends in Cognitive Sci. 37 (2006); Jennifer K. Robbennolt & Matthew Taksin, *Can Judges Determine Their Own Impartiality?*, 41 Monitor on Psychol. 24 (2010); *see also* Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 Vand. L. Rev. 1499, 1526 (1998) (citing Jon Elster, Solomonic Judgments: Studies in the Limitations of Rationality 57–59, 124 (1989)) ("What is interesting, and what Elster sees, is that individual cognitive biases may also have their origins in the need to make

> [P]eople rarely recognize their susceptibility to [ego-centric bias]. Although they rate themselves as "better than average" on a wide range of traits and abilities, most people also claim that their overly positive self-views are objectively true. Moreover their unwarranted claims of objectivity persist even when they are informed about the prevalence of the bias and invited to acknowledge its influence.

Emily Pronin, *Perception and Misperception of Bias in Human Judgment*, 11 Trends in Cognitive Sci. 37, 37 (2006). Egocentric bias causes individuals to construe information so as to protect or enhance their self-image or self-esteem.[31] Research demonstrates that this tendency is closely linked to cognitive dissonance: "people will adjust their attitudes and beliefs in a way that justifies choices and commitments previously made."[32]

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sense—to a greater degree than is justified—of a confusing, chaotic world, and that there is but a small step from this need to the social demands placed on law."); Mark C. Suchman, *On Beyond Interest: Rational, Normative, and Cognitive Perspectives in the Social Scientific Studies of Law*, 1997 Wis. L. Rev. 475, 484 (1997) ("Faced with a potentially confusing and ambiguous world, we construct cultural categories that impose method and coherence on our experiences and interactions. We then structure our behavior around these categories, to avoid disrupting our tacit agreements about who we are and what we are doing. Decision-making traces the contours of this cultural armature.").

[31] George Lowenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. Legal Stud. 135, 141 (1993).

[32] Donald C. Langevoort, *supra* note 30, at 1506 (citing George A. Akerlof & William T. Dickens, *The Economic Consequence of Cognitive Dissonance*, 72 Am. Econ. Rev. 307 (1982)); *see also* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*,

Egocentric bias can manifest itself in at least two specific ways when a challenged judge decides whether to recuse. First, it has been demonstrated that individuals frequently believe that their "judgments are less susceptible to bias than the judgments of others." Joyce Ehrlinger et al., *Peering into the Bias Blind Spot: People's Assessments of Bias in Themselves and Others*, 31 Personality & Soc. Psychol. Bull. 680, 681 (2005). So while a judge may have no difficulty identifying biases in a similarly situated colleague, that judge may not ascribe those same biases to himself or herself, or may believe that he or she could readily overcome them.[33] Second, it has been demonstrated that individuals will often ignore or rationalize facts or ideas that threaten to undermine their preexisting self-image.[34] The significance of this research is further bolstered by empirical studies finding that judges' decision-making is in fact impacted by election pressures, particularly in the criminal context where "tough on crime" rhetoric is a regular part of campaigns and judges can face scrutiny for rulings perceived to be sympathetic to defendants. *See* Kate Berry, Brennan Center for Justice, How Judicial

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117 Harv. L. Rev. 2463, 2498 (2004) (observing in the plea bargaining context that lawyers "tend to recall selectively the information that is favorable to their preexisting view and to interpret that information in self-serving ways").

[33] Chris Guthrie et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777 (2001) (asking a group of federal magistrate judges to estimate how often their colleagues are overturned on appeal as compared to how often they are, discovering that approximately 87.7% of judges believe that at least half their colleagues had higher reversal rates than they).

[34] See Deborah L. Rhode, *Institutionalizing Ethics*, 44 Case W. Res. L. Rev. 665, 685–86 (1994) (discussing the effect of egocentric bias on the ability of lawyers to comport with their ethical duties).

Elections Impact Criminal Cases, 1, 3-6 (2015), *available at* www.brennancenter.org/publication/how-judicial-elections-impact-criminal-cases.

The social science research concerning egocentric bias thus strongly supports the proposition that a judge's decision not to recuse himself or herself may be inherently unreliable.

CONCLUSION

For the foregoing reasons, Pennsylvania's lack of a procedure for independent review of Chief Justice Castille's decision not to recuse was one of the important circumstances that contributed to Petitioner's being denied due process. There could be no better examples of judges whose decisions should have been subject to independent review than the justice here and the justice in *Caperton*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the protections provided by the Fourteenth Amendment's Due Process Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

Central to the constitutional guarantee that all persons are entitled to "due process of law" is a commitment to an impartial justice system. As James Madison noted at our nation's founding, "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." *The Federalist No. 10*, at 47 (James Madison) (Clinton Rossiter ed., 1999). Thus, this Court has long recognized—and reiterated just six years ago—that "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). This case presents a

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[1]Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amicus curiae* states that all parties have consented to the filing of this brief.

judicial conflict of interest so extreme and so obvious that it contravenes that fundamental commitment to impartial justice.

In 1986, Petitioner Terrance Williams was convicted of murder and sentenced to death in Pennsylvania state court. At the time of Williams's trial and sentencing, Ronald Castille was the elected district attorney of Philadelphia. In addition to heading the office that prosecuted Williams, Castille personally authorized the pursuit of a death sentence in Williams's case. Although Williams's direct appeal and his initial request for post-conviction relief were unsuccessful, a post-conviction court in 2012 found that relevant evidence, namely, evidence that Williams had been the victim of sexual abuse at the hands of the man he killed, "was plainly 'suppressed.'" J.A. 126a. That court accused the trial prosecutor of "'gamesmanship,'" noting that the "pattern of nondisclosure . . . calls into question the trial prosecutor's intent as the architect of [the] prosecution." *Id.* at 145a; *see id.* at 75a n.23 ("Intentionally rooting evidence out of the . . . prosecution in order to secure a first degree murder conviction and death penalty sentence constitutes 'gamesmanship.'"). The court also explained that the suppressed evidence would have explained "how [the victim's] sexual advances amounted to a mitigating 'circumstance of the offense.'" *Id.* at 102a. Based on these findings, the post-conviction court stayed Williams's execution and granted him a new penalty hearing. The state immediately appealed.

By the time of that appeal, district attorney Ronald Castille had been elected Chief Justice of the Pennsylvania Supreme Court, and Williams filed a motion requesting that Castille recuse himself or, at least, refer the motion to the full court for decision.

Despite the fact that Castille was head of the district attorney's office during Williams's trial and sentence, despite the fact that Castille *personally authorized* pursuit of the death penalty in Williams's case, and despite the fact that the issue on appeal was whether attorneys on his staff had engaged in gross misconduct, Castille declined to recuse himself or refer the motion to the full court. Instead, he joined the court's opinion reversing the grant of relief and wrote a separate concurrence in which he excoriated both the attorneys who helped Williams seek that relief and the post-conviction court. By deciding to judge the conduct of his own office in a case in which he was personally involved, Castille created a judicial conflict so obvious and so extreme that it violated the Due Process Clause's guarantee of an impartial justice system.

By the time our nation's Founders drafted our enduring Constitution, the importance of impartial adjudicators was a bedrock principle of the common law and one reflected in many of the early state constitutions. When the Framers drafted the Constitution, they expanded upon this heritage and fully embraced the importance of impartial adjudication as central to a fair justice system, incorporating into the Fifth Amendment the promise that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. const. amend. V.

This commitment was magnified in the years after the Civil War as the Framers of the Fourteenth Amendment witnessed, among other things, widespread maladministration of justice in the South that meant that neither freed slaves nor Unionists could feel confident that they would be treated fairly in the courts. As a result, the Framers renewed the constitutional promise of due process in the Fourteenth

Amendment, providing that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. const. amend. XIV § 1. Representative Bingham, principal drafter of Section 1 of that Amendment, explained it this way: the Amendment was intended to secure "due process of law . . . which is impartial, equal, exact justice." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866).

This Court has repeatedly reaffirmed that promise, recognizing that the Due Process Clause's proscription on biased judges encompasses all cases in which a judge's interest "might lead him not to hold the balance nice, clear, and true." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). As this Court has explained, "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Id.* Rather, "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Id.*

The Due Process Clause requires such a stringent standard because "our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. at 136. "[T]o perform its high function in the best way," this Court has said, "'justice must satisfy the appearance of justice.'" *Id.* (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). Thus, to determine whether any given judicial conflict violates the Due Process Clause, this Court asks whether, "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudg-

ment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883-84 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

The interest in this case plainly does. Chief Justice Ronald Castille was the Philadelphia District Attorney and thus head of the office that prosecuted Williams throughout Williams's trial, sentencing, and direct appeal. Indeed, Castille personally approved pursuit of the death penalty against Williams, and his name appeared on the appellate brief asking that Williams's conviction be affirmed. And if these facts were not alone enough to warrant recusal, the issue Castille was asked to decide in this case is whether the trial prosecutor in Williams's case—that is, an attorney on Castille's staff and for whose conduct Castille was ultimately responsible—suppressed evidence in violation of the law, as the lower court found. An affirmance of the lower court's order would necessarily impugn the integrity and reputation of the office Castille led and thus his own reputation, as well. It is no insult to Castille to say that "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.* (quoting *Withrow*, 421 U.S. at 47). For a judge with that level of personal interest in a case to participate in deliberations, potentially influence his colleagues' votes, and then vote on the case himself creates not only the appearance of unfairness, but also the probability of it, both of which the Due Process Clause prohibits.

ARGUMENT

I. THE DUE PROCESS CLAUSE REQUIRES BOTH THE REALITY AND THE PERCEPTION OF A FAIR AND IMPARTIAL JUSTICE SYSTEM

The Fifth and Fourteenth Amendments of the U.S. Constitution provide that no person shall be deprived "of life, liberty, or property, without due process of law." U.S. const. amends. V, XIV § 1. These Amendments' explicit embrace of "due process of law" reflects our national commitment to an impartial judicial system, one in which judges "hold the balance nice, clear, and true." *Tumey*, 273 U.S. at 532.

A. The History of the Due Process Clause Shows a Particular Concern for Ensuring Unbiased Decisionmakers.

By the time the Framers drafted our enduring Constitution, the idea that judges should be impartial was already well-established. Dating at least as far back as the early seventeenth century, English common law recognized that impartial adjudicators were essential to the fair administration of justice, allowing disqualification in cases in which judges had a direct pecuniary interest in a case. *See, e.g.*, *Dr. Bonham's Case*, 77 Eng. Rep. 638 (C.P. 1610); John P. Frank, *Disqualification of Judges*, 56 Yale L.J. 605, 609 (1947). One English jurist argued that an even broader conception of bias would better ensure the fair and impartial administration of justice, stating that a "judge should disqualify . . . if he is related to a party, if he is hostile to a party, if he has been counsel in the case." Frank, *supra*, at 610 n.13.

This commitment to fair and impartial adjudicators was reflected in state constitutions adopted prior to the drafting of the Constitution. The Maryland

Declaration of Rights of 1776, for example, stated that "the independency and uprightness of Judges are essential to the impartial administration of Justice, and a great security to the rights and liberties of the people." Yale Law School, The Avalon Project, Constitution of Maryland—November 11, 1776, at art. XXX, http://avalon.law.yale.edu/17th_century/ma02.asp (last visited Dec. 2, 2015). Similarly, the Massachusetts Declaration of Rights of 1780 provided that "[i]t is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit." National Humanities Institute, Constitution of Massachusetts 1780, at art. XXIX, http://www.nhinet.org/ccs/docs/ma-1780.htm (last visited Dec. 2, 2015).

Building and expanding upon this English common law heritage, the Framers fully embraced the importance of impartial adjudication as central to a fair justice system. *See, e.g.*, Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 Iowa L. Rev. 181, 183 (2011) ("[t]he notion of an impartial trial under the direction of an unbiased judge is a central tenet of our system of justice"). As James Madison wrote in *The Federalist*, "[n]o man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." *The Federalist No. 10*, at 47 (James Madison) (Clinton Rossiter ed., 1999). Indeed, the Article III provision of life tenure for members of the federal judiciary was one manifestation of this belief in the importance of impartial and independent adjudicators. U.S. const. art. III § 1.

This interest in securing impartial justice was of particular concern to the drafters of the Fourteenth Amendment's Due Process Clause because they acted at a time when widespread maladministration of jus-

tice in the South meant that neither freed slaves nor Unionists could feel confident that they would be treated fairly in the courts. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1065, 1091, 1093-94 (1866) (remarks of Rep. Bingham); *id.* at 1263 (remarks of Rep. Broomall); Cong. Globe, 39th Cong., 2d Sess. 160 (1866) (remarks of Sen. Trumbull) (noting that Union delegations in the South have reported "that they can get no justice in the courts, and that they have no protection for life, liberty or property").

Moreover, the drafters of the Fourteenth Amendment were also keenly aware of the injustices wrought in the North by the federal Fugitive Slave Act of 1850. Under that law, the commissioner who decided whether the person brought before him was a fugitive slave received $10 for returning a purported slave, but only $5 for declaring him free. *See* Fugitive Slave Act, ch. 60, §§ 1-10, 9 Stat. 462 (1850); Cong. Globe, 32d Cong., 1st Sess. 1107 (1852) (remarks of Sen. Sumner) ("Adding meanness to the violation of the Constitution, it bribes the commissioner by a double fee to pronounce against freedom. If he dooms a man to slavery, the reward is $10; but, saving him to freedom, his dole is $5."); Cong. Globe, 36th Cong., 1st Sess. 1839 (1860) (remarks of Rep. Bingham) (decrying the fugitive slave law of 1850 as "a law which, in direct violation of the Constitution, transfers the judicial power . . . to irresponsible commissioners . . . tendering them a bribe of five dollars if . . . he shall adjudge a man brought before him on his warrant a fugitive slave"); *see generally* Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 40 (1986).

Because the Fugitive Slave Act deprived black defendants of basic fair-trial rights, including "an unbiased decision-maker," this issue "heightened aboli-

tionists' sensitivity to fair procedure." Akhil Reed Amar, The Bill of Rights 278 (1998); *see also* Akhil Reed Amar, America's Constitution: A Biography 388 (2005) (noting the "due-process claims of free blacks threatened by the rigged procedures of the Fugitive Slave Act of 1850"). Thus, the drafters of the Fourteenth Amendment renewed the national commitment to impartial justice and imposed its proscriptions on the states by including in the Fourteenth Amendment the guarantee that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. As Representative Bingham, principal drafter of Section 1 of the Fourteenth Amendment, explained, the Amendment was intended to secure "due process of law . . . which is impartial, equal, exact justice." Cong. Globe, 39th Cong., 1st Sess. 1094 (1866).

B. This Court's Precedents Confirm That the Due Process Clause Requires Impartial Adjudicators.

This Court has long applied the Due Process Clause to guarantee the impartial adjudicators the Framers of the Fourteenth Amendment found lacking in some Civil War-era courts. In so doing, this Court has recognized that the Due Process Clause's proscription extends more broadly than the common law prohibition on judges serving in cases in which they have a direct pecuniary interest, but rather encompasses those cases in which a judge's interest "might lead him not to hold the balance nice, clear, and true." *Tumey*, 273 U.S. at 532. As this Court explained most recently in *Caperton*, "[a]s new problems have emerged that were not discussed at common law . . . the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances 'in which experi-

ence teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" 556 U.S. at 877 (quoting *Withrow*, 421 U.S. at 47).

In *Tumey v. Ohio*, the Court considered a situation in which the judge had a financial interest, albeit a small one, in the outcome of the case because he would receive a supplement to his salary if he convicted the defendant. There, the Court held that the judge should have been disqualified "both because of his direct pecuniary interest in the outcome, *and* because of his official motive to convict and to graduate the fine to help the financial needs of the village." 273 U.S. at 535 (emphasis added). As the Court explained, "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Id.* at 532. Rather, "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Id.*

In a subsequent case, the Court underscored that "[t]he fact that the mayor [in *Tumey*] shared directly in the fees and costs did not define the limits of the principle." *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 60 (1972). Again, the Court emphasized that "the test" is whether the judge might be tempted "'not to hold the balance nice, clear, and true.'" *Id.* (quoting *Tumey*, 273 U.S. at 532). Thus, in that case, the Court held that it violated Due Process for a mayor to convict a defendant of traffic offenses where the fines from those offenses would help support the village of

which he was mayor. *Id.* at 59; *see id.* at 60 ("that 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court"). Any other result, the Court concluded, would have denied the defendant the "neutral and detached judge" to which he was entitled. *Id.* at 62.

In *In re Murchison*, the Court considered a case in which the judge had no financial interest in the case, but was nonetheless too interested in the outcome to participate in its adjudication consistent with the requirements of the Due Process Clause. In that case, the question was whether a judge who acted as a "'one-man grand jury'" and questioned a witness in that capacity could then preside over a contempt hearing that arose out of that grand jury proceeding. 349 U.S. at 133. The Court said no and elaborated at length on why the Due Process Clause prohibits judicial conflicts of interest that involve not just the reality, but also the appearance, of bias.

As the Court explained, "[a] fair trial in a fair tribunal is a basic requirement of due process," and "our system of law has always endeavored to prevent even the probability of unfairness." *Id.* at 136. This is why "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.* The Court recognized that "[t]hat interest cannot be defined with precision. Circumstances and relationships must be considered." *Id.*

To be sure, the Court acknowledged, "[s]uch a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in

the best way 'justice must satisfy the appearance of justice.'" *Id.* (quoting *Offutt*, 348 U.S. at 14); *see Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) ("We make clear that we are not required to decide whether in fact [the judge] was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "'would offer a possible temptation to the average . . . judge to . . . lead him to not . . . hold the balance nice, clear and true.'"" (quoting *Ward*, 409 U.S. at 60) (first two alterations in original)); *Withrow*, 421 U.S. at 47 ("Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" (quoting *In re Murchison*, 349 U.S. at 136)). The reason for this emphasis on the appearance of justice is simple: as this Court has explained, "[t]he power and the prerogative of a court to [elaborate principles of law] rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest of the highest order." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002).

Most recently, in *Caperton*, this Court reiterated that the common law proscription on judges serving in cases in which they have a direct pecuniary interest does not identify the outer limits of the Due Process Clause's protections. Nor is the application of the Due Process Clause limited to cases involving actual bias. 556 U.S. at 883 ("the Due Process Clause has been implemented by objective standards that do not require proof of actual bias"). As the Court explained, "[t]he difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules.

Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case." *Id.* Thus, in deciding whether a judicial conflict violates the Due Process Clause, the question the Court asks is whether "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at 883-84 (quoting *Withrow*, 421 U.S. at 47); *id.* at 884 (holding that the Due Process Clause was violated where "there is a serious risk of actual bias—based on objective and reasonable perceptions"). It plainly does in this case, as the next Section discusses.

II. THE JUDICIAL CONFLICT OF INTEREST IN THIS CASE WAS SO OBVIOUS AND EXTREME AS TO VIOLATE THE DUE PROCESS CLAUSE'S GUARANTEE OF AN IMPARTIAL ADJUDICATOR.

As just discussed, a conflict of interest inquiry under the Due Process Clause asks whether "'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883-84 (quoting *Withrow*, 421 U.S. at 47). The judicial conflict at issue in this case was both so extreme and so obvious that there can be no doubt that it posed such a risk and thus denied Williams the fair proceeding to which he was entitled under the Due Process Clause.

At the time of Williams's trial, sentencing, and direct appeal, Chief Justice Castille was the Philadelphia District Attorney and thus head of the office that was responsible for prosecuting Williams. In-

deed, Castille was no mere figurehead; he *personally* approved pursuit of the death penalty against Williams. Further, when Williams's case was on direct appeal, then-District Attorney Castille was one of the listed counsel on the brief asking the Pennsylvania Supreme Court to affirm his conviction.

These facts alone are sufficient to require recusal in this case for reasons that the Court made clear in *In re Murchison*. There, the Court explained that "[i]t would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." 349 U.S. at 137. "Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.* Indeed, the Court explained that "[w]hile he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal. Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." *Id.* (internal footnote omitted). Here, that is exactly what happened. Castille was one of the prosecutors responsible for Williams's conviction and death sentence, and yet he then went on to judge the validity of that sentence.

In *Murchison*, the Court also made clear a practical reason why prosecutors who move to the bench should not be allowed to review the cases in which they were previously involved: "As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings." *Id.* at 138. That is surely no less true here. As head of the dis-

trict attorney's office, Castille may not have been involved in the day-to-day details of the case, but he almost certainly was made privy to the internal deliberations of those who were so involved when he personally approved pursuit of the death penalty in the case. To aid him in that decision, Castille reviewed a memorandum that included a factual summary of the case, as well as a discussion of aggravating and mitigating factors in the case—all obviously presented from the perspective of the prosecutors in the case. "[U]nder a realistic appraisal of psychological tendencies and human weakness," *Caperton*, 556 U.S. at 883 (internal quotations omitted), it is difficult to imagine that Castille could put everything he learned from that memorandum out of his mind and approach the briefing in this case with a clean slate.

Moreover, even if that level of involvement were not sufficient to warrant recusal (and *amicus* believes that it is), recusal is plainly warranted here by virtue of the nature of the legal issue that was on appeal. In this case, Castille was not asked to resolve some generic dispute about the meaning of the law; rather, he was asked to assess whether the trial prosecutor in this case—a prosecutor under *his* supervision—violated her legal obligations to disclose evidence to Williams. Indeed, Castille was asked to assess whether a prosecutor in *his* office had engaged in such gross misconduct that the court below concluded she had "[i]ntentionally root[ed] evidence out of [the] prosecution in order to secure a first degree murder conviction and death penalty sentence." J.A. 75a n.23; *see id.* at 155a (post-conviction court also described trial prosecutor's decisions as a "'penalty phase by ambush'").

Given those sorts of attacks on the office he led, an objective observer could not help but conclude that

Castille would have felt that he and his reputation were also under attack. Indeed, in his opinion concurring in his court's decision reversing the grant of relief, Castille did not just disagree with the court below, he attacked it for engaging in "extraordinary, and unauthorized, measures" to grant relief based on claims that he deemed "time-barred and frivolous." 39a. And Castille's attacks did not end there: he also chastised the attorneys who brought the claims, accusing them of "pursuing an obstructionist anti-death penalty agenda" and "anoint[ing] themselves as a statewide, *de facto* capital defender's office." *Id.* at 42a-43a. Whatever one may think of the merits or timeliness of Williams's claims, the point is simply that Castille's opinion suggests he disagreed vehemently with the lower court's decision to grant relief. And no wonder: that decision impugned the integrity and reputation of the office he led and, by association, his own integrity and reputation. It is difficult to see how review of such a decision would not "offer a possible temptation to the average man as a judge to . . . not . . . hold the balance nice, clear, and true between the state and the accused." *Tumey*, at 532.

Finally, it should be of no moment that Castille's vote was not dispositive, because his views on the case and its merits may well have influenced his colleagues on the bench—and a reasonable person certainly should have concluded that they might at the time Castille made the recusal decision. *See, e.g.*, Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 Yale L.J. 82, 100 (1986) ("most group decisionmaking includes the exchange of ideas and arguments under circumstances that are calculated to affect individual views"); Daniel M. Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. Cin. L. Rev. 1159, 1195-

96 (2008) ("the circulation of memos and draft opinions has caused Justices to change their views in a large number of cases, and this in turn has changed the outcome in some cases"). There is, of course, no way to know for sure the effect his participation in deliberations had on his colleagues, but the very possibility that it did have some effect means that Castille's significant conflict of interest taints the decision of the entire court just as much as if his vote had been dispositive.

As this Court has recognized, "to perform its high function in the best way justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. at 136 (internal quotations omitted). It did not do so here.

CONCLUSION

For the foregoing reasons, the Court should reverse Chief Justice Castille's decision not to recuse himself, vacate the judgment of the Supreme Court of Pennsylvania, and remand for further proceedings without Chief Justice Castille's participation.

Respectfully submitted,

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No. 15-5040

In The
Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

ON WRIT FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF *AMICI CURIAE* THE ETHICS BUREAU AT YALE, *ET AL.* IN SUPPORT OF PETITIONER

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Interest of *Amici Curiae*

The **Ethics Bureau at Yale**[1] is a clinic at Yale Law School composed of fourteen law students supervised by an experienced practicing lawyer, lecturer, and ethics professor. The Bureau has drafted amicus briefs in matters involving lawyer ethics and judicial conduct, assisted defense counsel with ineffective assistance of counsel claims implicating issues of professional responsibility, and provided assistance, counsel, and guidance on a pro bono basis to not-for-profit legal service providers, courts, and law schools.

Additional *amici curiae* are the Louis Stein Center for Law and Ethics, as well as lawyers and scholars whose interests include the conduct of the judiciary and the codes that regulate judicial conduct. Because of the large number of *amici*, the names and brief descriptions of these individuals are attached as an appendix.

Because the impartiality of the judicial process, a fundamental element of judicial ethics, has been placed at issue by the pending matter, *amici* believe they might assist the Court in resolving the important issues presented.

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[1] The views expressed herein are not necessarily those of Yale University or Yale Law School. Pursuant to Rule 37.3 of the Rules of this Court, Petitioner and Respondent have consented to the filing of this brief. This brief was not written in whole or in part by counsel for any party, and no person or entity other than *amici* have made a monetary contribution to the preparation and submission of this brief.

Summary of Argument

In our system of justice, judges possess and exercise tremendous power. With that power comes the obligation to maintain high standards of professional responsibility. Preserving fair and impartial courts is so fundamental that it is a constitutional guarantee under the Due Process Clause. *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). At times "the probability of actual bias on the part of the judge is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). This case presents one of those circumstances.

To give definition to this constitutional requirement, the Model Code of Judicial Conduct ("the Code") promulgated by the American Bar Association ("ABA") was adopted, in relevant part, by forty-nine of the fifty state supreme courts as enforceable rules governing the conduct of each

state's judges.[2] In writing the Code, the ABA recognized that the American judicial system is premised upon the "principle that an independent, impartial and competent judiciary will interpret and apply the law that governs our society." Model Code of Judicial Conduct pmbl. (2011). Most importantly, the Code does not suggest mere aspirational guidelines, but instead establishes strict, enforceable standards for the ethical conduct of judges and judicial candidates. *Id.* As such, the Code *requires* judges to make competent decisions in an impartial manner, untainted by personal bias or prejudice.

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[2] Forty-nine of fifty states adopted the 2000 Model Code of Judicial Conduct. Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge's Impartiality "Might Reasonably Be Questioned,"* 14 Geo. J. Legal Ethics 55, 55 (2000). Thereafter, thirty-two states adopted the 2007 revision of the Code, while fifteen others have established committees to do so. *State Adoption of Revised Model Code of Judicial Conduct*, Am. B. Ass'n (Nov. 2, 2015), http://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map.html. Because the 2007 revision did not change the relevant Code provisions at issue in this case—the standards for impropriety, appearance of impropriety, and disqualification—these provisions have been adopted by forty-nine states, regardless of whether some of these states have adopted the 2007 revision in full. *See* Mark I. Harrison, *The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges*, 28 Just. Sys. J. 257 (2007).

Pennsylvania has adopted the 2007 Model Code of Judicial Conduct, which is referenced in this brief. In fact, Chief Justice Castille was a member of the Court that adopted and amended the Code of Judicial Conduct in both 2005 and 2014. *See* Pa. Code of Judical Conduct Canons 1-4 (2014); *see also* Pa. Const. art. 5, § 10(c) ("[T]he Supreme Court shall have the power to prescribe rules governing the conduct of all courts.").

Judges who wear "two hats" in the same case violate the requirement of judicial impartiality. *Mistretta v. United States*, 488 U.S. 361, 404 (1989). It is particularly egregious when a sitting judge continues to wear a prosecutor's hat. *See Gay v. United States*, 411 U.S. 974, 975 (1973) (Douglas, J., dissenting) ("[It is a] basic concept of due process of law that a person should not serve as both prosecutor and judge."). In blatant violation of these principles, then-Chief Justice of the Pennsylvania Supreme Court Ronald Castille refused to recuse himself despite having sought the death penalty in Mr. Terrance Williams' prosecution while serving as District Attorney of Philadelphia. Wearing a prosecutor's hat that was impossible to remove because of his personal stake and role as a lawyer in Mr. Williams' case, Chief Justice Castille impermissibly sat on the bench when his Court reversed Mr. Williams' successful petition for post-conviction relief.

As tempting as it might be, it is a per se violation of the Code for a prosecutor (or any lawyer, for that matter), having secured victory in the trial court and on direct appeal, to then sit as a judge on the court that adjudicates a challenge to that victory. In the view of *amici*, violations of the Code of this magnitude are clear evidence of a Due Process violation. Because there can be no dispute that the Code violations here are among the gravest found in the Code, Chief Justice Castille's conduct deeply undermined the integrity of the judicial proceedings and trampled any notion of Due Process for Mr. Williams.

Argument

I. By serving as prosecutor and then judge in the same case, Chief Justice Castille created a serious risk of actual bias by flouting his obligation to identify and avoid a forbidden conflict.

A. District Attorney Castille's personal involvement in the prosecution of Mr. Williams rendered him unable to later serve as a judge in Mr. Williams' case.

In order to decide their cases fairly and independently, judges are required by both Due Process and the Code to remain impartial and independent. This standard reflects the fundamental right, guaranteed by the Due Process Clause, to present one's case to an impartial tribunal. *Caperton*, 556 U.S. at 876. Based on several prior decisions, *Caperton* mandated an objective standard to guarantee this right—"whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden.'" *Id.* at 883-84 (quoting *Withrow*, 421 U.S. at 47).

This essential right is clearly endangered when a judge's conscious or unconscious partiality threatens to "infect both the process and outcome of a trial." Raymond McKoski, *Disqualifying Judges When Their Impartiality Might Reasonably Be Questioned*, 56 Ariz. L. Rev. 411, 432 (2014). Indeed,

anything that might tempt a judge to forget the burden of proof required to convict or lead the judge "not to hold the balance nice, clear and true between the State and the accused," denies the accused the Due Process of law *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

Chief Justice Castille had every reason to understand these obligations under both the Due Process Clause and the Code, but ignored them when he sat on a tribunal that decided the appeal of a case he began as District Attorney. A fundamental tenet of our adversarial system is the purposeful separation of the prosecutorial and judicial roles. *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) ("[T]he strict requirements of neutrality cannot be the same for prosecutors as for judges, whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime."); *United States v. Jones*, 997 F.2d 1475 (D.C. Cir. 1993) ("There is also a critical difference between the prosecutor's role as an advocate for the government's position and the judge's role as an impartial arbiter and protector of the defendant's rights.").

The ideal judge should be neutral and open-minded, serving as a detached arbiter rather than a forceful advocate for one side in a case. *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 466 (1952) (explaining that a judge "must think dispassionately and submerge private feeling on every aspect of a case"); Model Code of Judicial Conduct R. 2.2 cmt. 1 ("To ensure impartiality and fairness to all parties, a judge must be objective and open-minded."). In

contrast, a prosecutor is involved in a case as a vigorous advocate for the government in an adversarial process. It would thus be "difficult if not impossible for such a judge to free himself from the influence of what took place" in his previous role as a prosecutor. *In re Murchison*, 349 U.S. at 138. As a result, a prosecutor-turned-judge cannot be "wholly disinterested in the conviction or acquittal of those accused." *Id.* at 137

Psychological research on cognitive biases explains why a prosecutor cannot later serve as a neutral judge in the same case. When people are rewarded for their success in persuading others of the correctness of a position, they then become psychologically committed to that position and devote the majority of their mental effort to justifying it. *E.g.*, Philip E. Tetlock et al., *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. Personality & Soc. Psychol. 632, 633 (1989). This confirmation bias effect, known as defensive bolstering, makes people in such circumstances less likely to acknowledge the weaknesses of their positions and more likely to engage in self-justification. *Id.*

Empirical studies have also found that these inherent cognitive limitations make prosecutors more likely to minimize evidence inconsistent with their favored hypothesis—the defendant's guilt—and to construe ambiguous information in a way that supports this hypothesis. Barbara O'Brien, *A Recipe for Bias: An Empirical Look at the Interplay Between Institutional Incentives and Bounded Rationality in*

Prosecutorial Decision Making, 74 Mo. L. Rev. 999, 1027-32 (2009). A prosecutor publicly stakes out the position that the defendant should be found guilty when he files charges, and the verdict is the only feedback he receives about the correctness of that decision. *Id.* at 1022-23. Due to the nature of the prosecutor's ultimate task of publicly presenting an effective case for the defendant's guilt, a prosecutor-turned-judge would thus have to overcome powerful cognitive limitations to serve as a neutral, impartial judge in the same case in which he previously advocated, before the court and his community, for the correctness of his assessment of the defendant's guilt.[3]

Here, Chief Justice Castille's personal involvement in the prosecution of Mr. Williams compels the conclusion that he was subject to these cognitive limitations. As the District Attorney, he personally authorized the decision to seek the death penalty after he had already assessed the evidence against Mr. Williams and publicly committed himself to Mr. Williams' guilt and to a death

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[3] This bias is likely exacerbated in the context of post-conviction challenges. Scholars have identified institutional and psychological reasons why prosecutors may be unduly skeptical of such challenges; relevant factors include public pressure not to look "soft on crime," fear of offending police or victims by appearing too defense-minded, and the prosecutor's own personal commitment to the conviction. *E.g.*, Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 13 Geo. J. Legal Ethics 309 (2001); Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 Cal. W L. Rev. 389 (2002); Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Innocence*, 84 B.U. L. Rev. 125 (2004).

sentence. Although he was not advocating before the jury in his role as the District Attorney, he was responsible for supervising the trial prosecutor who was found to have violated her *Brady* obligations, and he signed his name on the appellate brief his office filed to defend the death sentence it had obtained in Mr. Williams' case. The psychological effects of cognitive bias and defensive bolstering apply perhaps even more powerfully to the District Attorney, an elected public official who was the face of his office's decision to prosecute and seek the death penalty against Mr. Williams.

Chief Justice Castille's partiality was further compounded because his task was to evaluate the performance of his own law office and the lawyers he supervised in prosecuting Mr. Williams. As District Attorney, he was responsible for overseeing the conduct of trial prosecutors in his office, including their compliance with *Brady* obligations to disclose exculpatory evidence. *Cf.* Pa. Rules of Prof'l Conduct R. 5.1(a) (1987) ("A partner in the law firm,[4] and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.").

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[4] "'Firm' or 'law firm' denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." Pa. Rules of Prof'l Conduct R. 1.0(c); *see also* Model Rules of Prof'l Conduct R. 1.0(c).

Given his professional investment in this case and his public accountability to the position of the State, the District Attorney could not be impartial and neutral when subsequently reviewing the conviction his office obtained. *See In re Bulger*, 710 F.3d 42, 49 (1st Cir. 2013) (explaining that a reasonable person might question whether a judge who bore supervisory responsibility for prosecutorial activities during some of the time at issue could remain impartial); *United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994) (holding that a judge who had been the U.S. Attorney, and therefore responsible for the entire office, should have recused himself from deciding a case that was under investigation during his tenure). Chief Justice Castille's decision to hear Mr. Williams' case thus flies in the face of his ethical obligations and the requirements of Due Process for a judge to perform all duties of judicial office "fairly and impartially," Model Code of Judicial Conduct R. 2.2, and to remain "objective and open-minded," *id.* cmt. 1.

B. A fortiori, Chief Justice Castille's judicial involvement in this case created the appearance of impropriety and partiality.

Judicial impartiality is not only crucial to protecting litigants' Due Process rights, but also in maintaining public confidence in the justice system. *Mistretta*, 488 U.S. at 407 ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). Indeed, the mere questioning of a court's impartiality "threatens the purity of the judicial process and its

institutions." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980). As such, maintaining the appearance of impartiality is as important as impartiality itself. *In re Murchison*, 349 U.S. at 136 ("[J]ustice must satisfy the appearance of justice."). The test under the Code is whether the conduct would create in "reasonable minds" a perception that the judge engaged in conduct that "reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge." Model Code of Judicial Conduct R. 1.2 cmt. 5. This rigorous standard is necessary because the public cannot respect the legitimacy of the courts if judges do not act as models of independence, integrity, and impartiality.[5]

As such, beyond the clear impropriety of Chief Justice Castille's judicial involvement in this case, there is an appearance of impropriety so manifest as to taint Mr. Williams' subsequent post-conviction proceedings before the Pennsylvania Supreme Court. Specifically, when a judge goes from advocating for one party to donning the black robe in the same case, he not only acts without integrity, but also undercuts the public's perception of judicial neutrality

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[5] The ABA urges judges to take considerable precautions when they take the bench to ensure that the appearance of judicial impartiality is maintained. For example, the ABA opined that judges should not allow their former firms to retain their names, *see* ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 143 (1935), should not receive a percentage of a contingency fee for the work they did on a case while employed at a firm, *see* ABA Comm. on Prof'l Ethics & Grievances, Informal Op. C-676 (1963), and should not receive a fee for referring a case to a firm, *see* ABA Comm. on Prof'l Ethics & Grievances, Informal Op. 433 (1961).

The appearance of impropriety will exist anytime a prosecutor subsequently presides over his case's appeal. The impropriety is amplified in this case because of the lower court finding that Mr. Williams sought to defend on appeal—namely, whether the trial prosecutor, who was supervised by District Attorney Castille, improperly withheld exculpatory evidence. As a result, the government's appeal required Chief Justice Castille to adjudicate the propriety of the conduct of an attorney under his own leadership and supervision as District Attorney. No reasonable person could conclude that Chief Justice Castille could impartially evaluate the performance of his own colleague, acting under his leadership, because that evaluation would require—both implicitly and explicitly—a judgment of his own leadership and supervision. Given Chief Justice Castille's clear personal interest in this case, it is difficult to conceive of facts that might cast a greater probability of bias or appearance of impropriety.

II. Chief Justice Castille had an affirmative obligation to recuse himself because his former involvement as a prosecutor in Mr. Williams' case rendered him partial.

A judge is required to disqualify himself "in any proceeding in which the judge's impartiality might reasonably be questioned." Model Code of Judicial Conduct R. 2.11(A). Under both the Code and Due Process, the standard in determining whether a judge is required to recuse himself is objective, focusing not on whether the judge is actually biased, but on whether the judge's impartiality might be reasonably questioned.

Caperton, 556 U.S. at 872 (noting that the Court has required recusal, where as an objective matter, "the probability of actual bias on the part of the judge is too high to be constitutionally tolerable." (internal citations omitted)); Model Code of Judicial Conduct R. 2.11(A).

Because his prior involvement in the case as a prosecutor rendered him partial, Chief Justice Castille was obligated to disqualify himself from this case. The Code identifies this precise circumstance as requiring disqualification when Rule 2.11 mandates that a judge recuse himself if he "served as a lawyer in the matter in controversy, or was associated with a lawyer in the matter in controversy." Model Code of Judicial Conduct R. 2.11(A)(6)(a). Thus, even if Chief Justice Castille had not played any role in Mr. Williams' prosecution, he would still be barred from hearing this case because of his association with the lawyers who did. Rule 2.11 further mandates that a judge who "served in governmental employment, and in such capacity participated personally or substantially as a lawyer or public official concerning the proceeding" also recuse himself. *Id* at R. 2.11(A)(6)(b). Any one of these circumstances obligates a judge to disqualify himself, and Chief Justice Castille's prior involvement as District Attorney satisfies all three.

Moreover, the Code stipulates that judges cannot sit in review of their own decisions, Model Code of Judicial Conduct R. 2.11(A)(6)(d), and prior involvement as a judge on a case necessarily disqualifies them from making future rulings that could be tainted by their prior knowledge, *see In re*

Murchison, 349 U.S. at 139 (finding a Due Process violation when a judge presided at the contempt hearing of a witness after serving as the "one-man grand jury" out of which the contempt charges arose). It would be anomalous to prohibit a judge from reviewing his or her previous decision while allowing a judge to hear a case that he was personally involved in prosecuting, as Chief Justice Castille did in Mr. Williams' case.

Additionally, due to his personal involvement in Mr. Williams' case at the trial level and on direct appeal, Chief Justice Castille likely had access and was privy to information uncovered during the District Attorney's Office's investigation, including information outside the bounds of what was discoverable and introduced at trial. Judges should not rely upon, or even consider, information received outside the official record because "the reliability of that information may not be tested through the adversary process." *United States v. Craven*, 239 F.3d 91, 103 (1st Cir. 2001). Accordingly, judges are obligated to disqualify themselves in cases where they have "personal knowledge of facts that are in dispute in the proceeding." Model Code of Judicial Conduct R. 2.11(A)(1).

Extrajudicial knowledge is proper grounds for recusal because this type of special insight into the facts of a case, without more, may prevent a judge from impartially weighing the parties' evidence and arguments. *In re Murchison*, 349 U.S. at 136-39 (1955) (holding that a judge who held one-man grand jury proceedings could not subsequently preside over the contempt hearing of a witness in that grand jury

because the judge could not free himself from the influence of personal knowledge of what occurred in the grand jury session); *Craven*, 239 F.3d at 103 (disqualifying a sentencing judge who based his sentence on an improper ex parte communication with a court-appointed expert). It would be "difficult, if not impossible, for a judge, no matter how sincere, to purge that information from her mind." *Id.* Here, of course, Chief Justice Castille's access to information went well beyond an ex parte communication.

The attempts to defend Chief Justice Castille's role in signing the death penalty authorization actually provide a compelling demonstration of the impropriety that required Chief Justice Castille to recuse himself. This Court has been told that Chief Justice Castille's approval for his subordinates to seek the death penalty was an "administrative formality." Resp't Opp'n Br. to the Pet. for Cert. 11 n.6. Let us hope not. The decision to seek the death penalty must be one of the most profound acts a prosecutor can reach. Without this "administrative" act by the District Attorney himself, Mr. Williams would not be fighting for his life. Moreover, Chief Justice Castille himself did not believe such actions were routine or trivial when he emphasized the number of executions he sought as District Attorney, as an important component of his political campaign for Chief Justice.

Furthermore, Chief Justice Castille's authorization to seek capital punishment has been defended because it did not reflect some form of personal animosity toward the defendant.

Appellant's Answer to the Mot. to Recuse, Joint Appendix ["J.A."] at 175a. But this characterization misses the point—personal animosity has nothing to do with the recusal standards at issue in this case. It is more than sufficient that at one time Chief Justice Castille was head of the District Attorney's Office in Philadelphia, that he personally authorized the seeking of the death penalty, and that the conduct of the District Attorney's Office under his tenure was the issue when the appeal from the grant of habeas relief came before the Court. These factors alone are more than sufficient to disable him from sitting on the Court that heard that appeal.

Disqualification is a critical prescription for maintaining impartiality. Rule 1.12(a) of the Pennsylvania Rules of Professional Conduct requires a judge moving from the bench to private practice "not [to] represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge." Pa. Rules Prof'l R. 1.12(a), And when a government lawyer moves to private practice, the lawyer is disqualified from representing a private client in a matter in which he or she had responsibility as a public official. *Id.* R. 1.11(a)(2) (explaining that a former government lawyer "shall not otherwise represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee"); *see General Motors Corp. v. City of New York*, 501 F.2d 639, 650-52 (2d Cir. 1974). The same public policy that informs the disqualification of a former government lawyer from representing a private client in the same matter for which he had official responsibility should disqualify

him from sitting as judge in the same matter. *Arnpriester*, 37 F.3d at 467-68.

Thus, Chief Justice Castille's decision not to recuse himself was an affront to the bedrock principle of an impartial judiciary. The Code does not merely list best practices, but instead demands that judges act in a manner that maintains the public trust in the judiciary. *See Caperton*, 556 U.S. at 889 (explaining that the Model Code and state codes of judicial conduct "serve to maintain the integrity of the judiciary and the rule of law"). The Code not only establishes ethical obligations that are binding on judges, but also embodies how judges across the country define and understand judicial impartiality. In adopting the Code's provisions concerning disqualifications, supreme court judges nationwide have agreed that transitioning from prosecutor to judge in the same case is improper and incompatible with judicial impartiality.

Chief Justice Castille had a clear ethical conflict in this case and therefore an obligation to recuse himself in the matter. His failure to do so did not just create an invidious harm to Mr. Williams, but also placed an indelible stain on the legitimacy of the judicial system of Pennsylvania.

III. Chief Justice Castille's partiality and impropriety cannot be "cured" by a multimember panel.

While this Court has never decided whether a multimember panel can "cure" a conflicted judge's participation in any proceeding, let alone one with

such high-stakes, the proper answer must be "no." The nature of the multimember panel compounds the insidious nature of such impropriety for four main reasons. First, when a single conflicted judge is allowed to participate in deliberations, he or she taints the entire panel's impartiality with explicit or implicit advocacy for one side. Accordingly, the conflicted judge's participation in the panel effectively multiplies the impermissible biases and ethical violations.

A panel of judges is not intended to be, and is not in fact, a collection of individuals screened off from communication with one another, each in his or her own silo. Instead, multimember panels handle appeals in a manner that maximizes the benefits of different perspectives, backgrounds, and experiences. *See, e.g.*, Daniel J. Meador, *Appellate Case Management and Decisional Processes*, 61 Va. L. Rev. 255, 281 (1975). It is thus both the expectation and the reality that the panel of judges will participate together in oral arguments and conferences, engage in dialogue designed to persuade their fellow judges of their respective views, and circulate written opinions in the hopes of convincing others to sign on to a particular position. *See, e.g.*, A.B.A. Comm'n on Standards of Judicial Admin., *Standards Relating to Appellate Courts* § 3.01 cmt., at 9 (1977) ("The basic concept of an appeal is that it submits the questions involved to collective judicial judgment."). In short, the very essence of the multimember tribunal creates countless opportunities for a biased judge to infect his colleagues' perspectives by advocating for his impermissible bias during each stage of deliberation.

The potential for a multimember panel to be tainted by the partiality of a single biased judge is not merely a common sense conclusion, but a proposition supported by extensive psychological literature on group susceptibility to post-deliberation attitudinal shifts. The impact of one member's bias on group decisionmaking can enhance that bias' effect. The phenomenon of group polarization occurs "when an initial tendency of individual group members toward a given direction is enhanced following group discussion." Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 Yale L.J. 71, 85 (2000). As a result, "groups often make more extreme decisions than would the typical or average individual." *Id.* "Group polarization is among the most robust patterns found in deliberating bodies," *id.*, and multiple studies have replicated the phenomenon in various contexts, *see, e.g.*, Daniel J. Isenberg, *Group Polarization: A Critical Review and Meta-Analysis*, 50 J. Personality & Soc. Psychol. 1141 (1986). Furthermore, there is growing evidence from studies on multimember judicial panels that judges are far from immune from this polarization. Sunstein, *supra*, at 103-04 (citing Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 Yale L.J. 2155 (1998); and Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 Va. L. Rev. 1717 (1997)).

Given this phenomenon, it is clear that deliberation does not always produce the golden mean of all its members' attitudes in a way that can cancel out bias. Instead, allowing the entry of bias

multiplies the risk that the panel will make a more extreme decision in the direction of that bias.

Second, when the conflicted judge's potential interests in a proceeding are readily apparent, it is extremely difficult for others on the panel to freely criticize one side without apprehension that to do so will tarnish their relationship with their colleague. In this case, the conduct of the District Attorney's Office under Chief Justice Castille's tenure was the central issue on appeal to the Pennsylvania Supreme Court. Any reasonable observer would conclude that all of the Justices were conflicted because each must have considered, either consciously or subconsciously, how criticizing the District Attorney's Office in their conferences or the circulation of draft opinions would affect their rapport with a colleague with whom they deal every day. Given each judge's duty to decide cases impartially and objectively, based solely on the merits of the arguments introduced by each side, such considerations are clearly impermissible.

Again, these concerns are not simply common sense assumptions, but are propositions backed by an extensive psychological literature on motivated or self-interested reasoning. *See, e.g.*, Ziva Kunda, *The Case for Motivated Reasoning*, 108 Psychol. Bull. 480, 483 (1990) ("[People] search memory for those beliefs and rules that could support their desired conclusion. They may also creatively combine accessed knowledge to construct new beliefs that could logically support the desired conclusion. The objectivity of this justification construction process is illusory because people *do not realize* that

the process is biased by their goals. (emphasis added)). Furthermore, unlike the U.S. Supreme Court Justices, judges in other appeals courts often exhibit dissent aversion partly because "the costs in impaired collegiality from frequent dissenting" may outweigh the benefits. *See* Lee Epstein, William M. Landes & Richard A. Posner, *Why (And When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. Legal Analysis 101, 135 (2011).

Third, Chief Justice Castille's role as the Chief Justice placed him in a prime position to exert his influence through both his administrative power and seniority. Specifically, the Pennsylvania Code states that "the president judge of a court shall [b]e the executive and administrative head of the court, supervise the judicial business of the court, promulgate all administrative rules and regulations, make all judicial assignments, and assign and reassign among the personnel of the court available chambers and other physical facilities." Pa. Cons. Stat. § 325(e)(1). Unlike most judicial decisions, which occur in open court and must be explained by reasons that are available to public scrutiny, the Chief Justice's exercise of administrative duties in large part occurs behind closed doors and is thus less constrained by the obligations of accountability and is shielded from public scrutiny. *Cf.* Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. Pa. L. Rev 1575, 1632 (2006) (describing how the Chief Justice's administrative decisions in the U.S. Supreme Court are shielded from the public view).

The additional authority vested in the Chief Justice may serve as an extraneous consideration, either consciously or subconsciously, for the other Justices on the panel. As an initial matter, the Justices may be concerned that ruining their rapport with the Chief Justice will negatively affect many of the day-to-day aspects of their work, including the opinion writing assignments they receive, their chamber space, and their physical facilities. Beyond just the potential for inconvenience and annoyance, however, the Chief Justice's administrative powers may serve as an additional tool for him or her to exert influence over the rest of the Court. *See* Frank B. Cross & Stefanie Lindquist, *The Decisional Significance of the Chief Justice*, 154 U. Pa. L. Rev. 1665, 1667-68 (2006); *see also* Tracey E. George & Albert H. Yoon, *Chief Judges: The Limits of Attitudinal Theory and Possible Paradox of Managerial Judging*, 61 Vand. L. Rev. 1, 2-4 (2008) (describing a case in which a Chief Judge strategically waited for two of his colleagues to take senior status before circulating a petition, so that they could not participate).

Indeed, the Chief Justice takes the lead in structuring oral arguments and conferences. As such, he or she may effectively frame the entire proceeding in a manner that is advantageous to his or her preferred position by speaking first, setting the agenda, and strategically deciding when a vote will be taken. *Cf.* Cross & Lindquist, *supra*, at 1668-69; *see also* Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 Sci. 453, 453 (1981) (discussing how the same option may become more attractive or persuasive if it

is framed in way that is less threatening to its audience). Chief Justice Rehnquist himself explained that "what the conference shapes up like is pretty much what the [C]hief [J]ustice makes it." David M. O'Brien, *Storm Center: The Supreme Court in American Politics* 200 (6th ed. 2003).

Even if the administrative powers of the Chief Justice have no immediate impact, "the very title of 'Chief Justice' may provide an amorphous source of leadership authority. so that a Chief Justice generally has an initial *psychological* advantage over the other Justices in a struggle for influence within the Court." Cross & Lindquist, *supra*, at 1673-74 (emphasis added) (internal quotation marks omitted). Psychological research has demonstrated that individuals often voluntarily defer to authority figures, sometimes even to the detriment of others or themselves.

This basic concept is entrenched in the fields of both social and organizational psychology, and it has been studied extensively for decades. *See, e.g.*, Robert B. Cialdini & Noah J. Goldstein, *Social Influence: Compliance and Conformity* 55 Ann. Rev. Psychol. 591, 596 (2004) ("Most organizations would cease to operate efficiently if deference to authority were not one of the prevailing norms. Yet, the norm is so well entrenched in organizational cultures that orders are regularly carried out by subordinates with little regard for potential deleterious *ethical consequences* of such acts." (emphasis added)); Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective to Voluntary Deference to Authorities*, 1 Personality & Soc. Psychol. 323, 323 (1997) ("In fact,

as the Milgram studies on obedience to authority suggested, people often defer to authorities even when the actions they must undertake to do so are extremely personally aversive.").

Fourth, it is instructive to review Chief Justice Castille's position that the role of the other six Justices cured his ethical violations in light of the ethical rules concerning lawyer conflicts of interest adopted by the Pennsylvania Supreme Court. Like almost every state supreme court, Pennsylvania has adopted the full imputation principle enshrined in Rule 1.10 of the Model Rules. Pa. Rules of Prof'l Conduct R. 1.10. This provision mandates that all lawyers in the same law firm are subject to each other's conflicts of interest, and all are equally barred from taking on an engagement that creates a conflict for any one lawyer in the firm. *Id.* It does not matter whether the lawyer is three thousand miles away, is in a different department of the firm, has never met the lawyer with the actual conflict, or

knows nothing about the matter or the client creating the conflict.[6]

The principles behind this rule contrast sharply with Chief Justice Castille's view that his conflict was not imputed to his colleagues and, moreover, that he was permitted to participate fully in every aspect of the adjudication. While *amici* applaud the steps the Pennsylvania Supreme Court took to protect clients from lawyers with conflicts of interest, it is the view of *amici* that, if anything, the need to protect litigants from judges with conflicts of interest is even more important. Consequently, if Chief Justice Castille's participation in this case is left standing, it will be anything but the correct result.

One could argue that many of the aforementioned threats to impartiality would persist, creating a biased panel, even if the Chief Justice had recused himself. Even if the Chief Justice were screened off from the case, he might

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[6] Equally instructive is the Pennsylvania Supreme Court's adoption of a narrow cure for one specialized type of conflict of interest that permits the lifting of imputation. Pennsylvania's conflict imputation rule stipulates that when a lawyer joins a new law firm, the conflicts he or she brings to the new law firm will not be imputed to others in the firm so long as the new lawyer is immediately and fully screened from participation in any matter in which he or she would be conflicted, and so long as elaborate protocols are instantly instituted to assure that the screen is not breached. Pa. Rules of Prof'l Conduct R. 1.10. Contrast that with Justice Castille's opposing approach of bringing his breach of Rule 2.11 to the Court's adjudicative process by ostentatiously taking a full seat at the oral argument, the deliberation table, and the drafting and production process of the opinion.

still be able to exercise his administrative powers and intangible influence on the panel in other ways. Furthermore, the other Justices, knowing Chief Justice Castille's connection to the District Attorney's Office, might still harbor some concern about criticizing the prosecutor's misconduct.

It would be inconceivable, however, to require an entire court of last resort to recuse itself. Instead, Justices may sit, even if conflicted, in situations where their presence is *absolutely* necessary. *See United States v. Will*, 449 U.S. 200, 213 (1980) (reaffirming the "ancient" Rule of Necessity that a judge must sit in a case, even if "he has [a] personal interest" where the case could not be heard otherwise) (emphasis added). This does not, however, excuse the behavior of Chief Justice Castille or affect the remedy in this case because the Chief Justice's presence was simply not necessary. The Code may have to tolerate some conflicts, but it does not tolerate impropriety that can easily be avoided. Furthermore, because Chief Justice Castille is now retired, and new Justices have joined the Pennsylvania Supreme Court, there will be no such problem on remand.

For the foregoing reasons, a multimember tribunal cannot cure the profound conflicts of one member. Instead, it provides an incubator for one member to spread impermissible and unethical biases, either through implicit or explicit advocacy within the deliberation process or through the creation of an environment where colleagues are affected by considerations extraneous to the

objective merits of the case. Furthermore, Chief Justice Castille's actual and symbolic authority as Chief Justice further intensify his potential to taint the entire panel because of the power and influence he may possess within the Court. As such, it is clear that Chief Justice Castille's participation in this case eviscerated the very concept of impartiality. He should not have been permitted to affect his colleagues in a way that assaults the principle of even-handed justice and violates the Due Process rights guaranteed to every individual by the United States Constitution.

Conclusion

Chief Justice Castille had both a constitutional and ethical obligation to recuse himself in this case. His prior involvement as District Attorney ensured that he was incapable of providing the most basic Due Process right to a fair tribunal to Mr. Williams. Moreover, his clear disregard for numerous sections of the Code that required his recusal left an indelible stain on the Pennsylvania judicial system. To make matters worse, Chief Judge Castille threatened the impartiality of each and every one of his colleagues on the Pennsylvania Supreme Court by hampering their ability to decide the case based solely on an impartial consideration of the evidence presented. Such a blatant disregard of both constitutional protections and ethical obligations simply cannot be tolerated because of the damage it does to individuals like Mr. Williams and to the broader community's need for confidence in the independence, impartiality, and fairness of the

judiciary. If Chief Justice Castille's conduct is not unconstitutional impropriety itself, *amici* do not know what is.

Respectfully submitted,

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Appendix A

IDENTITY OF *AMICI CURIAE*[1]

The **Louis Stein Center for Law and Ethics**[2] is based at Fordham University School of Law and sponsors programs, develops publications, supports scholarship on contemporary issues of law and ethics, and encourages professional and public institutions to integrate moral perspectives into their work. Over the past decade, the Stein Center and affiliated Fordham Law School faculty have examined the ethical dimensions of the administration of criminal justice, including issues of judicial ethics.

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[1] The affiliations of the various *amici* are for identification purposes only and the views expressed in this brief are not necessarily the vies of those institutions and firms.

[2] The views expressed herein are not necessarily those of Fordham University or Fordham Law School.

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No. 15-5040

IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF FORMER APPELLATE COURT JURISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici, who are seven former appellate court judges indentified in the Appendix, have an interest in this case because it implicates the fundamental integrity, effective operation, and public perception of the judicial system.

Amici served in a range of leadership positions while on the bench and during their post-judicial careers, and have significant experience in judicial administration. They offer their views regarding the appellate process and judicial standards of conduct in order to assist this Court in resolving the critical issues before it in this case.

SUMMARY OF ARGUMENT

A judge's role as an impartial arbiter is sacrosanct. The moment a judge learns that he or she may be biased toward or against a litigant, or that the judge's continued participation in a proceeding will give rise to even the potential appearance of bias, he or she should recuse. In many cases, the potential for bias or its appearance can be difficult to ascertain. This case is not one of them.

Here, former Chief Justice Castille (i) personally authorized petitioner's death sentence while serving as the District Attorney of Philadelphia, (ii) campaigned for his seat on the Supreme Court of Pennsylvania by championing his record of sending "45

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties received notice of *amici's* intention to file this brief at least 10 days prior to its due date. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

people to death row,", including the petitioner, (iii) publicly expressed disdain toward petitioner's counsel and their "anti-death penalty agenda," and (iv) refused to recuse himself from a review of a post-conviction court decision holding that petitioner was entitled to a new sentencing hearing due to misconduct committed by a prosecutor who was under his supervision as District Attorney.

Certainly, these facts, and most particularly, Chief Justice Castille's participation in petitioner's case at an earlier phase, creates an unmistakable perception that petitioner (and others similarly situated) would not receive a fair hearing on their appellate claims. If the *amici*, while serving as appellate court judges, had encountered the situation that Chief Justice Castille confronted in this case, each of them would have recused himself or herself from the proceeding forthwith. Due process requires nothing less.

Amici firmly believe that prejudice can result from the participation of a potentially biased member of an appellate tribunal regardless of the ultimate vote. Thus, even though the Pennsylvania Supreme Court's decision was unanimous, and Chief Justice Castille did not cast the so-called "deciding vote," that does not end the analysis. Indeed, the majority of federal and state courts that have considered this issue have found that a potentially biased judge's participation in a multimember appellate panel taints the entire proceeding and that any decision in the proceeding must be vacated, regardless of the ultimate vote distribution. A minority of courts hold otherwise, concluding that this Court's decision in *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986), only requires vacature where the biased judge casts the decisive vote.

The minority view ignores a truth supported by a substantial body of empirical data, testimonials of former United States Supreme Court Justices, the experience of *amici*, and common sense – that judges serving in multimember tribunals work together closely and are highly influenced by the opinions of their fellow jurists. In fact, the appellate system was deliberately structured with multimember panels because a decision reached collaboratively is typically better than one reached in the absence of collaboration. Appellate judges are supposed to influence one another, and a judge who vigorously argues his or her position often affects the disposition of the case. Permitting the presence of bias in such a collaborative process not only undermines the proceeding in question, but the public's confidence in the judicial system.

Amici encourage the Court to adopt the unexceptionable proposition that all tribunals should unanimously comprise only impartial jurists, and jurists whose participation would be deemed impartial by those who come before the courts. Due process, fairness, and the reputation of the vaunted judicial system require nothing less.

ARGUMENT

I. CHIEF JUSTICE CASTILLE'S PARTICIPATION IN THE PROCEEDING PRESENTED AN UNCONSTITUTIONAL POTENTIAL FOR BIAS

A. Factual Background

In this case, Chief Justice Castille personally authorized petitioner's death sentence while serving as District Attorney of Philadelphia and supervised petitioner's prosecutor, who a post-sentencing court found had engaged in "gamesmanship" and "[i]ntentionally

root[ed] evidence out of the [petitioner's] prosecution in order to secure a first degree murder conviction and death penalty sentence . . . ." *Commonwealth* v. *Williams*, No. CP-51-CR-0823621-1984 (Phila. Ct. Com. Pls. Nov. 27, 2012) (9 n.23).

While campaigning for his seat on the Supreme Court of Pennsylvania, Chief Justice Castille championed his record of placing petitioner and 44 other individuals on death row and telegraphed to voters that he supported the death penalty. For example, one news article at the time noted that "Castille says if [judicial] candidates take positions then they'll have to recuse themselves from any decisions in those cases." Lisa Brennan, *State Voters Must Choose Next Supreme Court Member*, Legal Intelligencer, Oct. 28, 1993. The article then quotes Chief Justice Castille as stating that:

> There's really no solution to it . . . You ask people to vote for you, they want to know where you stand on the death penalty. I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get the hint.

Id. As a result of Chief Justice Castille's direct participation in this case as a prosecutor and his prior statements while on the campaign trail, petitioner requested that Chief Justice Castille recuse himself from the proceeding, or at least allow the Pennsylvania Supreme Court to consider the question *en banc*. Chief Justice Castille denied the request in its entirety without explanation the same day he received it.

B. Standard For Determining Whether Recusal Is Required

The standard for determining whether a judge's refusal to recuse himself or herself violates due process is whether the circumstances of the case "'would offer

a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Aetna Life Ins. Co.*, 475 U.S. 813, 822 (1986) (quoting *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972)). The question is not whether the judge is actually, subjectively biased—though that is of course sufficient—but whether "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009) (quoting *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 466 (1971)). This objective determination involves "'a realistic appraisal of psychological tendencies and human weakness,' [and whether] the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at 883-84 (quoting *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975)). Any potential for bias is unacceptable because in every judicial proceeding there must not be "even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

C. Recusal Was Required Under The Circumstances

A focus of the Pennsylvania Supreme Court's review of the post-conviction court's decision was whether the alleged misconduct by the prosecutor resulted in the suppression of exculpatory evidence and whether this had a material effect on the petitioner's sentencing. Regardless of the merits of the claim, its substance addresses the conduct of prosecutors who were, at the time, under Chief Justice Castille's direction. The direct, personal nature of the conflict is illustrated by examining the consequences of a different decision by the Pennsylvania Supreme Court. If, for example, the Pennsylvania Supreme Court had

concluded that a prosecutor in that office had engaged in misconduct, a broader inquiry into whether such conduct was systemic and whether Chief Justice Castille condoned or encouraged such behavior at the time may have been warranted, as well as possible bar proceedings against those involved.

Chief Justice Castille's strong statements in concurrence further call into question his impartiality and the degree of influence that his passionately held views may have had on his colleagues. In his concurrence, Chief Justice Castille attacked petitioner's counsel, the Federal Community Defender Office ("FCDO"), declaring that:

> [T]his 'private' group of federal lawyers pursuing an obstructionist anti-death penalty agenda have essentially anointed themselves as statewide, *de facto* capital defender's office . . .
>
> [I]t has become apparent that [Post Conviction Relief Act] courts throughout Pennsylvania need to be vigilant and circumspect when it comes to the activities of this particular advocacy group, to ensure that the FCDO does not turn PCRA proceedings, and in particular serial proceedings, into a circus where FCDO lawyers are the ringmasters, with their parrots and puppets as a sideshow.

Commonwealth v. *Williams*, No. 668 CAP (Pa. Dec. 15, 2014) (4-5). In this very case, however, the post-conviction court had found that Chief Justice Castille's office had engaged in "gamesmanship" in order to secure a death sentence. But even if the attack in his concurring opinion were warranted, Chief Justice Castille left his impartiality, and thus the integrity of the decision, open to serious question by deliberating on a case where the FCDO has made a

claim of misconduct against his former colleagues, and by extension, him.

Chief Justice Castille's mere presence in the case also undoubtedly tainted the other Justices involved, who in addition to likely hearing his views about the case and the underlying facts, were in the unenviable position of examining, in his presence, whether the conduct of a prosecutor under his command resulted in a miscarriage of justice.

II. THE PARTICIPATION OF A POTENTIALLY BIASED TRIBUNAL MEMBER TAINTS THE ENTIRE TRIBUNAL

A. A Majority Of Courts Have Held That A Potentially Biased Tribunal Member Taints The Entire Tribunal

In *Aetna Life Insurance Co.* v. *Lavoie*, the Court determined that because a Justice on the Alabama Supreme Court had a "direct, personal, substantial [and] pecuniary" interest in the case before him, his participation in the case violated the appellant's due process rights. With regard to the remedy for this violation, the Court noted that lower courts were divided as to when a disqualified judge's participation in a decision by a multimember tribunal required the decision to be vacated. Some courts had decided that if the disqualified judge had not cast the deciding vote, his or her vote was "mere surplusage" and the decision could stand. 475 U.S. at 826-27 (citing *State ex rel. Langer* v. *Kositzky*, 38 N.D. 616, 166 N.W. 534 (1918)). Other courts, however, appeared to suggest otherwise. *Id.* (citing *Oakley* v. *Aspinwall*, 3 N.Y. 547 (1850)).

The Court refrained from resolving this split in authority and instead focused on the fact that the disqualified Alabama Supreme Court Justice cast the deciding vote in the Alabama Supreme Court's 5-to-4 decision and that there was no legal authority allowing a decision to stand under such circumstances. Because the disqualified Alabama Supreme Court Justice had cast the deciding vote and also because he drafted the Alabama Supreme Court's opinion, the Court held that he had a "leading role" in the decision and thus the "appearance of justice" was best served by vacating the decision and remanding for further proceedings.

Although the opinion of the Court left unanswered the question of whether the outcome would have been the same had the Alabama Supreme Court Justice's vote not been decisive, Justices Brennan and Blackmun each wrote concurrences pointing out that it should. Specifically, Justice Brennan emphasized the collective and deliberative nature of the appellate decision-making process and that:

> [E]xperience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

Id. at 831 (emphasis in original). Justice Blackmun (joined by Justice Marshall) repeated these observations and further noted that:

> [W]e . . . know, from our own experience on this nine-Member Court, that a forceful dissent may lead Justices to rethink their original positions and change their votes. And to suggest that the author of an opinion where the final vote is 5 to 4 somehow plays a peculiarly decisive 'leading role' . . . ignores the possibility of a case where the author's powers of persuasion produce an even larger margin of votes.

Id. at 832. Justice Brennan's and Justice Blackmun's common-sense position now reflects the majority rule in federal and state courts nationwide.[2]

Amici urge the Court to hold that a biased tribunal member taints the entire tribunal in which he or she participates, and that due process protections mandate that any decision rendered in such a proceeding be vacated. Such a ruling is not only justified by the clear and convincing arguments set forth by Justices Brennan and Blackmun in *Aetna* thirty years ago, but also by an extensive body of empirical research

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[2] *See Stivers* v. *Pierce*, 71 F.3d 732, 747 (9th Cir. 1995); *Hicks* v. *City of Watonga*, 942 F.2d 737, 748-50 (10th Cir. 1991); *Antoniu* v. *SEC*, 877 F.2d 721, 725-26 (8th Cir. 1989); *Cinderella Career & Finishing Schs., Inc.* v. *FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970); *Am. Cyanamid Co.* v. *FTC*, 363 F.2d 757, 767 (6th Cir. 1966); *Berkshire Emps. Ass'n of Berkshire Knitting Mills* v. *NLRB*, 121 F.2d 235, 239 (3d Cir. 1941); *Sullivan* v. *Elsmere*, 23 A.3d 128, 136 (Del. 2011); *Tesco Am. Inc.* v. *Strong Indus. Inc.*, 221 S.W.3d 550, 556 (Tex. 2006); *Powell* v. *Anderson*, 660 N.W.2d 107, 122-24 (Minn. 2003); *Nationwide Mut. Ins. Co.* v. *Clay*, 525 So. 2d 1339, 1340-41 (Ala. 1987); *but see Richardson* v. *Quarterman*, 537 F.3d 466, 474 (5th Cir. 2008); *Bradshaw* v. *McCotter*, 796 F.2d 100, 4-6 (5th Cir. 1986); *Rollins* v. *Horn*, No. Civ.A.00-1288, 2005 U.S. Dist. LEXIS 15493, * 142 t 143-45 (E.D. Penn. July 26, 2005); *Goodheart* v. *Casey*, 565 A.2d 757, 195-97 (Pa. 1989).

that in recent years has confirmed that appellate judges, in rendering their decisions, are highly influenced by their fellow appellate judges, and thus an appellate judge's role in a case can never be deemed "mere surplusage".

B. Appellate Decision-making Is A Collaborative Process And Every Judge Who Participates Affects The Process

Numerous studies have demonstrated that a single member of an appellate panel can meaningfully influence the outcome of a proceeding even though the other panel members may have diametrically opposing ideologies and have the ability to simply out-vote the single panel member. See, *e.g.*, Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, 306 (2004); Sidney A. Shapiro and Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 Geo. Mason L. Rev. 319, 335 (2012).

Because the deliberations between appellate judges are conducted behind closed doors, these studies use various proxies to determine the likely original positions of the relevant tribunal members and whether the influence of their fellow tribunal members caused them to move off of such positions.

One such proxy involves a comparison of a particular appellate judge's decisions on an issue against that judge's decisions when the composition of his or her appellate court changes. See, *e.g.*, Scott R. Meinke and Kevin M. Scott, *Collegial Influence and Judicial Voting Change: The Effect of Membership Change on U.S. Supreme Court Justices*, 41 L. & Soc. Rev. 4 (2007). Another popular proxy is to compare the decisions of panels based on whether a minority,

majority, or the entire panel of judges were appointed by presidents of the same political party.[3] Although these methods have clear drawbacks, they unequivocally demonstrate that the composition of a court matters and that each member affects the outcome. Such a conclusion should not be surprising. The appellate system was deliberately structured to be collaborative because a decision reached collaboratively is typically better than one reached in its absence. As Justice Cardozo noted:

> The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.

Benjamin N. Cardozo, *The Nature of the Judicial Process* 177 (1922 ed.).

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[3] *See* Sunstein, *supra*, at 306 (Stating, in the context of an analysis of federal appellate judge voting behavior based on the political party of the president that appointed each judge, that "[t]o understand the importance of group dynamics on judicial panels, it is important to emphasize that a Democratic majority, or Republican majority, has enough votes to do what it wishes. Apparently a large disciplining effect comes from the presence of a single panelist from another party."); *see also* Shapiro, *supra*, at 335 ("[W]hen appellate panels are split 2-1 along partisan lines, both Republican and Democratic judges vote less ideologically than they do when a panel is made up entirely of Republican or Democratic judges. While strategic reasons might give rise to this effect, the craft model points to deliberation among the judges as an explanation. The idea here is that the third judge persuades the other two judges by the exchange of information and the persuasiveness of reasoned argument.").

Many studies have indicated that a decision made by a group is often better than a decision made by a single individual. See Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, N.Y.U. L. Rev. 962, 971-73 (2005) (surveying a range of experiments measuring the accuracy of group decision-making).

This is often explained with reference to the Condorcet Jury Theorem, which holds that in circumstances where each person has a better than 50% chance of gauging a correct answer, the probability of a correct answer increases as the size of the group increases. *Id.* at 973. Commentators reviewing statistical data have indicated that this applies equally in the judicial context and have suggested that "increasing the number of judges making a decision will increase the probability that a court will reach a correct decision." Pauline T. Kim, *Deliberation and Strategy on the United States Court of Appeals: An Empirical Exploration of Panel Effects*, 157 U. Penn. L. Rev. 1319, 1321 (2009) (citing Lewis A. Kornhauser and Lawrence G. Sager, *Unpacking the Court*, 96 Yale L.J. 82, 98 (1986)).

Although group decision-making generally appears to be superior to individual decision-making, it is no bulwark against bias, and empirical evidence suggests that groups are as susceptible to bias as individuals. See *Sunstein, supra*, at 795 (citing Gretchen Chapman and Eric Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, Heuristics & Biases: The Psychology of Intuitive Judgment 120 (2002)); Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 Psychol. Rev. 687 (1996).

Whether this holds true in the context of multimember tribunals has received little scholarly attention, but the dynamics of appellate decision-making suggest that the presence of bias can be a decisive factor in many cases. For example, during deliberations, an appellate judge who forcefully argues his or her position often signals to his or her colleagues that the issue is important and merits particular consideration. A forceful, yet unsound argument is not likely to carry the day. However, as Justice Cardozo once noted, various cases "might be decided either way" and "that reasons plausible and fairly persuasive might be found for one conclusion as for another." Benjamin N. Cardozo, *The Nature of the Judicial Process*. If a decision can balance precariously atop a fulcrum, it is not a stretch to think that bias can cause it to topple toward a particular direction.

C. The Number Of Votes A Decision Receives Says Little About The Circumstances That Generated Such A Result

An understanding of the dynamics of appellate decision-making also exposes the great fallacy in the minority rule that requires a disqualified judge to have cast the "deciding vote" in order for the relevant decision to be vacated. For example, the great majority of appellate decisions are unanimous – with estimates of unanimity hovering around 85% for published decisions issued by the Federal Circuit Courts. See Sidney A. Shapiro and Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*. This is mostly because opinions are drafted based on the input of each tribunal member and there is typically an effort to build consensus and for the court to speak with one voice. However, commentators also observe that appellate

judges occasionally join a majority ruling because of "dissent aversion." *Id.* at 330.

According to these commentators, appellate judges may be concerned that a dissent will make the court less collegial or feel that a dissent is likely to be futile because it will "not persuade either of the majority's judges to switch his vote." See Cass R. Sustein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation.* These commentators note that "a dissent might, in extreme cases, attract the attention of the Supreme Court or lead to a rehearing en banc; and when judges dissent it is partly in the hope that such an outcome will occur," but that "Supreme Court review is rare . . . and courts of appeals do not regularly rehear cases en banc." *Id.* Accordingly, with regard to decision-making on an appellate panel, once the pendulum swings, it tends to go all the way.

Although "dissent aversion" is a controversial topic and commentators may overstate the frequency of its occurrence, it is a plausible partial explanation for the high level of unanimity in certain appellate courts, and lends further weight to the fact that the vote distribution of an appellate decision says little about the circumstances that generated such a result. See Sidney A. Shapiro and Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses.*

D. All U.S. Judicial Proceedings Should Unanimously Comprise Of Impartial Jurists, And Jurists Who Appear To Be Impartial

Once a particular appellate judge has been disqualified from a proceeding on the basis of bias, any decisions in which he or she took part should be vacated as a matter of law. As the arguments above demonstrate, attempting to determine the degree by which a disqualified judge tainted a proceeding is typically impossible. A biased judge may be just as likely to have engineered a unanimous result as a simple majority result. Appellate judges do not operate in silos, and the effect of a biased judge's participation cannot be reduced to a "no harm, no foul" determination based on vote distribution, as the minority's "deciding vote" rule would lead some to believe. *Aetna Life Ins. Co.*, 475 U.S. at 832. If a biased judge takes part in a proceeding, he or she is motivated to influence the outcome, and odds are he or she will not sit idly by.

The minority's "deciding vote" rule not only offends common sense, but also sends a signal to the public that judicial impartiality is not a guarantee. *Id.* at 832. This damages the credibility of the judicial system, and as *amici* know full well, credibility is a critical pillar on which the judicial system stands. In other contexts, this Court has indicated that the decision of an improperly constituted court is void.[4] This Court should likewise hold that in keeping with the due process protections set forth in the U.S. Constitution, decisions rendered by tribunals that do not

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[4] *See, e.g., Nguyen* v. *U.S.*, 539 U.S. 69, 71 (2003) (holding that a U.S. Court of Appeals panel consisting of two Article III judges and one Article IV judge was improperly constituted and thus its decisions must be vacated).

unanimously comprise impartial jurists, and those perceived to be impartial, are void as a matter of law.

CONCLUSION

For the foregoing reasons, *Amici* believe that Chief Justice Castille's participation in this case gave rise to an unconstitutional potential for bias and that his mere participation in the proceeding justifies vacating the decision of the Pennsylvania Supreme Court and remanding for the further proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX

Amici Curiae

Wallace B. Jefferson

Wallace Jefferson served as Chief Justice of the Supreme Court of Texas from 2004 to 2013 and as Associate Justice of the Supreme Court of Texas from 2001 to 2004, making Texas judicial history as the first African-American to occupy either position. During his time on the bench, he served as President of the Conference of Chief Justices, which consists of the highest judicial officer of the 50 states, the District of Columbia, and the United States territories. In 2014, he was honored with the 2014 Texas Center for Legal Ethics Chief Justice Jack Pope Professionalism Award, which honors judges or attorneys that personify the highest standards of legal professionalism and integrity.

Judith S. Kaye

Judith Kaye served as Chief Judge of the State of New York and Chief Judge of the Court of Appeals for 15 years, until her retirement in 2008. She was appointed to the Court in 1983 by Governor Mario Cuomo, becoming the first woman ever to serve on New York's highest court. Judge Kaye left her mark on New York's courts as a creative reformer, streamlining New York's jury system and establishing specialized courts to focus on issues such as drug addiction, domestic violence and mental health issues. She is a recipient of the National Center for State Courts' William H. Rehnquist Award for Judicial Excellence.

Timothy K. Lewis

Timothy Lewis served as Judge of the United States Court of Appeals for the Third Circuit from 1992 to 1999 and Judge of the United States District Court for the Western District of Pennsylvania from 1991 to 1992. He was recognized as one of the "Lawdragon 500 Leading Judges in America" and is an Honorary Fellow of the American Academy of Appellate Lawyers.

Kenneth W. Starr

Kenneth Starr served as Solicitor General of the United States from 1989 to 1993 and Judge of the United States Court of Appeals for the District of Columbia Circuit from 1983 to 1989. He has argued 36 cases before the United States Supreme Court, including 25 cases during his service as Solicitor General. He also served as an Independent Prosecutor in five investigations and as a law clerk to Chief Justice Warren E. Burger of the United State Supreme Court from 1975 to 1977.

Deanell Reece Tacha

Deanell Tacha served for 25 years on the United States Court of Appeals for the Tenth Circuit. Appointed by President Reagan in 1986, she also served as Chief Judge of the Circuit from 2001-2007 and retired in 2011. Prior to her service on the bench, Judge Tacha was a White House Fellow (1971-972), directed the Douglas County (Kansas) Legal Aid Clinic from 1974 to 1977 and was a professor and associate dean at the University of Kansas School of Law.

William H. Webster

William Webster served as Director of the Central Intelligence Agency from 1987 to 1991, Director of the Federal Bureau of Investigation from 1978 to 1987, Judge of the United States Court of Appeals for the Eight Circuit from 1973 to 1978, and Judge of the United States District Court for the Eastern District of Missouri. During his service on the bench, he was Chairman of the Judiciary Conference Advisory Committee on the Criminal Rules and was a member of the Ad Hoc Committee on Habeas Corpus and the Committee of Court Administration. He has received numerous honors for his service and contributions to the law, including the Presidential Medal of Freedom, the National Security Medal, the American Bar Association Medal, the American Judicature Society's Justice Award, and the American Law Institute's Henry J. Friendly Medal for outstanding contributions to the law.

Michael A. Wolff

Michael Wolff served as Justice of the Supreme Court of Missouri from 1998 to 2011 and served as Chief Justice for the term starting on July 1, 2005 and ending on June 30, 2007. During his time on the bench, he served as Chair of the Missouri Sentencing Advisory Commission, received the Missouri Bar's Theodore McMillian Judicial Excellence Award, and was named "Lawyer of the Year" by Missouri Lawyers' Weekly.

No. 15-5040

IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF OF FORMER APPELLATE COURT JURISTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Amici, who are eight former appellate court judges indentified in the Appendix, have an interest in this case because it implicates the fundamental integrity, effective operation, and public perception of the judicial system.

Amici served in a range of leadership positions while on the bench and during their post-judicial careers, and have significant experience in judicial administration. They offer their views regarding the appellate process and judicial standards of conduct in order to assist this Court in resolving the critical issues before it in this case.

SUMMARY OF ARGUMENT

A judge's role as an impartial arbiter is sacrosanct. The moment a judge learns that he or she may be biased toward or against a litigant, or that the judge's continued participation in a proceeding will give rise to even the potential appearance of bias, he or she should recuse. In many cases, the potential for bias or its appearance can be difficult to ascertain. This case is not one of them.

Here, former Chief Justice Castille (i) personally authorized petitioner's death sentence while serving as the District Attorney of Philadelphia, (ii) campaigned for his seat on the Supreme Court of Pennsylvania by championing his record of sending "45

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* or their counsel made a monetary contribution to its preparation or submission. Counsel of record for both parties received notice of *amici's* intention to file this brief at least 10 days prior to its due date. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

people to death row,", including the petitioner, (iii) publicly expressed disdain toward petitioner's counsel and their "anti-death penalty agenda," and (iv) refused to recuse himself from a review of a post-conviction court decision holding that petitioner was entitled to a new sentencing hearing due to misconduct committed by a prosecutor who was under his supervision as District Attorney.

Certainly, these facts, and most particularly, Chief Justice Castille's participation in petitioner's case at an earlier phase, creates an unmistakable perception that petitioner (and others similarly situated) would not receive a fair hearing on their appellate claims. If the *amici*, while serving as appellate court judges, had encountered the situation that Chief Justice Castille confronted in this case, each of them would have recused himself or herself from the proceeding forthwith. Due process requires nothing less.

Amici firmly believe that prejudice can result from the participation of a potentially biased member of an appellate tribunal regardless of the ultimate vote. Thus, even though the Pennsylvania Supreme Court's decision was unanimous, and Chief Justice Castille did not cast the so-called "deciding vote," that does not end the analysis. Indeed, the majority of federal and state courts that have considered this issue have found that a potentially biased judge's participation in a multimember appellate panel taints the entire proceeding and that any decision in the proceeding must be vacated, regardless of the ultimate vote distribution. A minority of courts hold otherwise, concluding that this Court's decision in *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986), only requires vacature where the biased judge casts the decisive vote.

The minority view ignores a truth supported by a substantial body of empirical data, testimonials of former United States Supreme Court Justices, the experience of *amici*, and common sense – that judges serving in multimember tribunals work together closely and are highly influenced by the opinions of their fellow jurists. In fact, the appellate system was deliberately structured with multimember panels because a decision reached collaboratively is typically better than one reached in the absence of collaboration. Appellate judges are supposed to influence one another, and a judge who vigorously argues his or her position often affects the disposition of the case. Permitting the presence of bias in such a collaborative process not only undermines the proceeding in question, but the public's confidence in the judicial system.

Amici encourage the Court to adopt the unexceptionable proposition that all tribunals should unanimously comprise only impartial jurists, and jurists whose participation would be deemed impartial by those who come before the courts. Due process, fairness, and the reputation of the vaunted judicial system require nothing less.

ARGUMENT

I. CHIEF JUSTICE CASTILLE'S PARTICIPATION IN THE PROCEEDING PRESENTED AN UNCONSTITUTIONAL POTENTIAL FOR BIAS.

A. Factual Background.

In this case, Chief Justice Castille personally authorized petitioner's death sentence while serving as District Attorney of Philadelphia and supervised petitioner's prosecutor, who a post-sentencing court found had engaged in "gamesmanship" and "[i]ntentionally

root[ed] evidence out of the [petitioner's] prosecution in order to secure a first degree murder conviction and death penalty sentence " *Commonwealth* v. *Williams*, No. CP-51-CR-0823621-1984 (Phila. Ct. Com. Pls. Nov. 27, 2012) (9 n.23).

While campaigning for his seat on the Supreme Court of Pennsylvania, Chief Justice Castille championed his record of placing petitioner and 44 other individuals on death row and telegraphed to voters that he supported the death penalty. For example, one news article at the time noted that "Castille says if [judicial] candidates take positions then they'll have to recuse themselves from any decisions in those cases." Lisa Brennan, *State Voters Must Choose Next Supreme Court Member*, Legal Intelligencer, Oct. 28, 1993. The article then quotes Chief Justice Castille as stating that:

> There's really no solution to it You ask people to vote for you, they want to know where you stand on the death penalty. I can certainly say I sent 45 people to death row as District Attorney of Philadelphia. They sort of get the hint.

Id. As a result of Chief Justice Castille's direct participation in this case as a prosecutor and his prior statements while on the campaign trail, petitioner requested that Chief Justice Castille recuse himself from the proceeding, or at least allow the Pennsylvania Supreme Court to consider the question *en banc*. Chief Justice Castille denied the request in its entirety without explanation the same day he received it.

B. Standard For Determining Whether Recusal Is Required.

The standard for determining whether a judge's refusal to recuse himself or herself violates due process is whether the circumstances of the case "'would offer

a possible temptation to the average judge to lead him not to hold the balance nice, clear and true.'" *Aetna Life Ins. Co.*, 475 U.S. 813, 822 (1986) (quoting *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972)). The question is not whether the judge is actually, subjectively biased—though that is of course sufficient—but whether "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009) (quoting *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 466 (1971)). This objective determination involves "'a realistic appraisal of psychological tendencies and human weakness,' [and whether] the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Id.* at 883-84 (quoting *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975)). Any potential for bias is unacceptable because in every judicial proceeding there must not be "even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

C. Recusal Was Required Under The Circumstances.

A focus of the Pennsylvania Supreme Court's review of the post-conviction court's decision was whether the alleged misconduct by the prosecutor resulted in the suppression of exculpatory evidence and whether this had a material effect on the petitioner's sentencing. Regardless of the merits of the claim, its substance addresses the conduct of prosecutors who were, at the time, under Chief Justice Castille's direction. The direct, personal nature of the conflict is illustrated by examining the consequences of a different decision by the Pennsylvania Supreme Court. If, for example, the Pennsylvania Supreme Court had

concluded that a prosecutor in that office had engaged in misconduct, a broader inquiry into whether such conduct was systemic and whether Chief Justice Castille condoned or encouraged such behavior at the time may have been warranted, as well as possible bar proceedings against those involved.

Chief Justice Castille's strong statements in concurrence further call into question his impartiality and the degree of influence that his passionately held views may have had on his colleagues. In his concurrence, Chief Justice Castille attacked petitioner's counsel, the Federal Community Defender Office ("FCDO"), declaring that:

> [T]his 'private' group of federal lawyers pursuing an obstructionist anti-death penalty agenda have essentially anointed themselves as statewide, *de facto* capital defender's office
>
> [I]t has become apparent that [Post Conviction Relief Act] courts throughout Pennsylvania need to be vigilant and circumspect when it comes to the activities of this particular advocacy group, to ensure that the FCDO does not turn PCRA proceedings, and in particular serial proceedings, into a circus where FCDO lawyers are the ringmasters, with their parrots and puppets as a sideshow.

Commonwealth v. *Williams*, No. 668 CAP (Pa. Dec. 15, 2014) (4-5). In this very case, however, the post-conviction court had found that Chief Justice Castille's office had engaged in "gamesmanship" in order to secure a death sentence. But even if the attack in his concurring opinion were warranted, Chief Justice Castille left his impartiality, and thus the integrity of the decision, open to serious question by deliberating on a case where the FCDO has made a

claim of misconduct against his former colleagues, and by extension, him.

Chief Justice Castille's mere presence in the case also undoubtedly tainted the other Justices involved, who in addition to likely hearing his views about the case and the underlying facts, were in the unenviable position of examining, in his presence, whether the conduct of a prosecutor under his command resulted in a miscarriage of justice.

II. THE PARTICIPATION OF A POTENTIALLY BIASED TRIBUNAL MEMBER TAINTS THE ENTIRE TRIBUNAL.

A. A Majority Of Courts Have Held That A Potentially Biased Tribunal Member Taints The Entire Tribunal.

In *Aetna Life Insurance Co.* v. *Lavoie*, the Court determined that because a Justice on the Alabama Supreme Court had a "direct, personal, substantial [and] pecuniary" interest in the case before him, his participation in the case violated the appellant's due process rights. With regard to the remedy for this violation, the Court noted that lower courts were divided as to when a disqualified judge's participation in a decision by a multimember tribunal required the decision to be vacated. Some courts had decided that if the disqualified judge had not cast the deciding vote, his or her vote was "mere surplusage" and the decision could stand. 475 U.S. at 826-27 (citing *State ex rel. Langer* v. *Kositzky*, 38 N.D. 616, 166 N.W 534 (1918)). Other courts, however, appeared to suggest otherwise. *Id.* (citing *Oakley* v. *Aspinwall*, 3 N.Y. 547 (1850)).

The Court refrained from resolving this split in authority and instead focused on the fact that the disqualified Alabama Supreme Court Justice cast the deciding vote in the Alabama Supreme Court's 5-to-4 decision and that there was no legal authority allowing a decision to stand under such circumstances. Because the disqualified Alabama Supreme Court Justice had cast the deciding vote and also because he drafted the Alabama Supreme Court's opinion, the Court held that he had a "leading role" in the decision and thus the "appearance of justice" was best served by vacating the decision and remanding for further proceedings.

Although the opinion of the Court left unanswered the question of whether the outcome would have been the same had the Alabama Supreme Court Justice's vote not been decisive, Justices Brennan and Blackmun each wrote concurrences pointing out that it should. Specifically, Justice Brennan emphasized the collective and deliberative nature of the appellate decision-making process and that:

> [E]xperience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition. The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates *necessarily* imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.

Id. at 831 (emphasis in original). Justice Blackmun (joined by Justice Marshall) repeated these observations and further noted that:

> [W]e know, from our own experience on this nine-Member Court, that a forceful dissent may lead Justices to rethink their original positions and change their votes. And to suggest that the author of an opinion where the final vote is 5 to 4 somehow plays a peculiarly decisive 'leading role' ignores the possibility of a case where the author's powers of persuasion produce an even larger margin of votes.

Id. at 832. Justice Brennan's and Justice Blackmun's common-sense position now reflects the majority rule in federal and state courts nationwide.[2]

Amici urge the Court to hold that a biased tribunal member taints the entire tribunal in which he or she participates, and that due process protections mandate that any decision rendered in such a proceeding be vacated. Such a ruling is not only justified by the clear and convincing arguments set forth by Justices Brennan and Blackmun in *Aetna* thirty years ago, but also by an extensive body of empirical research

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[2] *See Stivers* v. *Pierce*, 71 F.3d 732, 747 (9th Cir. 1995); *Hicks* v. *City of Watonga*, 942 F.2d 737, 748-50 (10th Cir. 1991); *Antoniu* v. *SEC*, 877 F.2d 721, 725-26 (8th Cir. 1989); *Cinderella Career & Finishing Schs., Inc.* v. *FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970); *Am. Cyanamid Co.* v. *FTC*, 363 F.2d 757, 767 (6th Cir. 1966); *Berkshire Emps. Ass'n of Berkshire Knitting Mills* v. *NLRB*, 121 F.2d 235, 239 (3d Cir. 1941); *Sullivan* v. *Elsmere*, 23 A.3d 128, 136 (Del. 2011); *Tesco Am. Inc.* v. *Strong Indus. Inc.*, 221 S.W.3d 550, 556 (Tex. 2006); *Powell* v. *Anderson*, 660 N.W.2d 107, 122-24 (Minn. 2003); *Nationwide Mut. Ins. Co.* v. *Clay*, 525 So. 2d 1339, 1340-41 (Ala. 1987); *but see Richardson* v. *Quarterman*, 537 F.3d 466, 474 (5th Cir. 2008); *Bradshaw* v. *McCotter*, 796 F.2d 100, 4-6 (5th Cir. 1986); *Rollins* v. *Horn*, No. Civ.A.00-1288, 2005 U.S. Dist. LEXIS 15493, * at 143-45 (E.D. Penn. July 26, 2005); *Goodheart* v. *Casey*, 565 A.2d 757, 195-97 (Pa. 1989).

that in recent years has confirmed that appellate judges, in rendering their decisions, are highly influenced by their fellow appellate judges, and thus an appellate judge's role in a case can never be deemed "mere surplusage"

B. Appellate Decision-making Is A Collaborative Process And Every Judge Who Participates Affects The Process.

Numerous studies have demonstrated that a single member of an appellate panel can meaningfully influence the outcome of a proceeding even though the other panel members may have diametrically opposing ideologies and have the ability to simply out-vote the single panel member. See, *e.g.*, Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 Va. L. Rev. 301, 306 (2004); Sidney A. Shapiro and Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 Geo. Mason L. Rev. 319, 335 (2012).

Because the deliberations between appellate judges are conducted behind closed doors, these studies use various proxies to determine the likely original positions of the relevant tribunal members and whether the influence of their fellow tribunal members caused them to move off of such positions.

One such proxy involves a comparison of a particular appellate judge's decisions on an issue against that judge's decisions when the composition of his or her appellate court changes. See, *e.g.*, Scott R. Meinke and Kevin M. Scott, *Collegial Influence and Judicial Voting Change: The Effect of Membership Change on U.S. Supreme Court Justices*, 41 L. & Soc. Rev. 4 (2007). Another popular proxy is to compare the decisions of panels based on whether a minority,

majority, or the entire panel of judges were appointed by presidents of the same political party.[3] Although these methods have clear drawbacks, they unequivocally demonstrate that the composition of a court matters and that each member affects the outcome. Such a conclusion should not be surprising. The appellate system was deliberately structured to be collaborative because a decision reached collaboratively is typically better than one reached in its absence. As Justice Cardozo noted:

> The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.

Benjamin N. Cardozo, *The Nature of the Judicial Process* 177 (1922 ed.).

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[3] *See* Sunstein, *supra*, at 306 (Stating, in the context of an analysis of federal appellate judge voting behavior based on the political party of the president that appointed each judge, that "[t]o understand the importance of group dynamics on judicial panels, it is important to emphasize that a Democratic majority, or Republican majority, has enough votes to do what it wishes. Apparently a large disciplining effect comes from the presence of a single panelist from another party."); *see also* Shapiro, *supra*, at 335 ("[W]hen appellate panels are split 2-1 along partisan lines, both Republican and Democratic judges vote less ideologically than they do when a panel is made up entirely of Republican or Democratic judges. While strategic reasons might give rise to this effect, the craft model points to deliberation among the judges as an explanation. The idea here is that the third judge persuades the other two judges by the exchange of information and the persuasiveness of reasoned argument.").

Many studies have indicated that a decision made by a group is often better than a decision made by a single individual. See Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, N.Y.U. L. Rev. 962, 971-73 (2005) (surveying a range of experiments measuring the accuracy of group decision-making).

This is often explained with reference to the Condorcet Jury Theorem, which holds that in circumstances where each person has a better than 50% chance of gauging a correct answer, the probability of a correct answer increases as the size of the group increases. *Id.* at 973. Commentators reviewing statistical data have indicated that this applies equally in the judicial context and have suggested that "increasing the number of judges making a decision will increase the probability that a court will reach a correct decision." Pauline T. Kim, *Deliberation and Strategy on the United States Court of Appeals: An Empirical Exploration of Panel Effects*, 157 U. Penn. L. Rev. 1319, 1321 (2009) (citing Lewis A. Kornhauser and Lawrence G. Sager, *Unpacking the Court*, 96 Yale L.J. 82, 98 (1986)).

Although group decision-making generally appears to be superior to individual decision-making, it is no bulwark against bias, and empirical evidence suggests that groups are as susceptible to bias as individuals. See *Sunstein*, *supra*, at 795 (citing Gretchen Chapman and Eric Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, Heuristics & Biases: The Psychology of Intuitive Judgment 120 (2002)); Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 Psychol. Rev. 687 (1996).

Whether this holds true in the context of multimember tribunals has received little scholarly attention, but the dynamics of appellate decision-making suggest that the presence of bias can be a decisive factor in many cases. For example, during deliberations, an appellate judge who forcefully argues his or her position often signals to his or her colleagues that the issue is important and merits particular consideration. A forceful, yet unsound argument is not likely to carry the day. However, as Justice Cardozo once noted, various cases "might be decided either way" and "that reasons plausible and fairly persuasive might be found for one conclusion as for another." Benjamin N. Cardozo, *The Nature of the Judicial Process*. If a decision can balance precariously atop a fulcrum, it is not a stretch to think that bias can cause it to topple toward a particular direction.

C. The Number Of Votes A Decision Receives Says Little About The Circumstances That Generated Such A Result.

An understanding of the dynamics of appellate decision-making also exposes the great fallacy in the minority rule that requires a disqualified judge to have cast the "deciding vote" in order for the relevant decision to be vacated. For example, the great majority of appellate decisions are unanimous – with estimates of unanimity hovering around 85% for published decisions issued by the Federal Circuit Courts. See Sidney A. Shapiro and Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*. This is mostly because opinions are drafted based on the input of each tribunal member and there is typically an effort to build consensus and for the court to speak with one voice. However, commentators also observe that appellate

judges occasionally join a majority ruling because of "dissent aversion." *Id.* at 330.

According to these commentators, appellate judges may be concerned that a dissent will make the court less collegial or feel that a dissent is likely to be futile because it will "not persuade either of the majority's judges to switch his vote." See Cass R. Sustein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*. These commentators note that "a dissent might, in extreme cases, attract the attention of the Supreme Court or lead to a rehearing en banc; and when judges dissent it is partly in the hope that such an outcome will occur," but that "Supreme Court review is rare and courts of appeals do not regularly rehear cases en banc." *Id.* Accordingly, with regard to decision-making on an appellate panel, once the pendulum swings, it tends to go all the way.

Although "dissent aversion" is a controversial topic and commentators may overstate the frequency of its occurrence, it is a plausible partial explanation for the high level of unanimity in certain appellate courts, and lends further weight to the fact that the vote distribution of an appellate decision says little about the circumstances that generated such a result. See Sidney A. Shapiro and Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*.

D. All U.S. Judicial Proceedings Should Unanimously Comprise Of Impartial Jurists, And Jurists Who Appear To Be Impartial.

Once a particular appellate judge has been disqualified from a proceeding on the basis of bias, any decisions in which he or she took part should be vacated as a matter of law. As the arguments above demonstrate, attempting to determine the degree by which a disqualified judge tainted a proceeding is typically impossible. A biased judge may be just as likely to have engineered a unanimous result as a simple majority result. Appellate judges do not operate in silos, and the effect of a biased judge's participation cannot be reduced to a "no harm, no foul" determination based on vote distribution, as the minority's "deciding vote" rule would lead some to believe. *Aetna Life Ins. Co.*, 475 U.S. at 832. If a biased judge takes part in a proceeding, he or she is motivated to influence the outcome, and odds are he or she will not sit idly by.

The minority's "deciding vote" rule not only offends common sense, but also sends a signal to the public that judicial impartiality is not a guarantee. *Id.* at 832. This damages the credibility of the judicial system, and as *amici* know full well, credibility is a critical pillar on which the judicial system stands. In other contexts, this Court has indicated that the decision of an improperly constituted court is void.[4] This Court should likewise hold that in keeping with the due process protections set forth in the U.S. Constitution, decisions rendered by tribunals that do not

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[4] *See, e.g., Nguyen* v. *U.S.*, 539 U.S. 69, 71 (2003) (holding that a U.S. Court of Appeals panel consisting of two Article III judges and one Article IV judge was improperly constituted and thus its decisions must be vacated).

unanimously comprise impartial jurists, and those perceived to be impartial, are void as a matter of law.

CONCLUSION

For the foregoing reasons, *Amici* believe that Chief Justice Castille's participation in this case gave rise to an unconstitutional potential for bias and that his mere participation in the proceeding justifies vacating the decision of the Pennsylvania Supreme Court and remanding for the further proceedings.

Respectfully submitted,

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APPENDIX

APPENDIX

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Wallace B. Jefferson

Wallace Jefferson served as Chief Justice of the Supreme Court of Texas from 2004 to 2013 and as Associate Justice of the Supreme Court of Texas from 2001 to 2004, making Texas judicial history as the first African-American to occupy either position. During his time on the bench, he served as President of the Conference of Chief Justices, which consists of the highest judicial officer of the 50 states, the District of Columbia, and the United States territories. In 2014, he was honored with the 2014 Texas Center for Legal Ethics Chief Justice Jack Pope Professionalism Award, which honors judges or attorneys that personify the highest standards of legal professionalism and integrity.

Judith S. Kaye

Judith Kaye served as Chief Judge of the State of New York and Chief Judge of the Court of Appeals for 15 years, until her retirement in 2008. She was appointed to the Court in 1983 by Governor Mario Cuomo, becoming the first woman ever to serve on New York's highest court. Judge Kaye left her mark on New York's courts as a creative reformer, streamlining New York's jury system and establishing specialized courts to focus on issues such as drug addiction, domestic violence and mental health issues. She is a recipient of the National Center for State Courts' William H. Rehnquist Award for Judicial Excellence.[5]

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[5] With sadness, we report that Judge Kaye passed away on January 7, 2016.

Timothy K. Lewis

Timothy Lewis served as Judge of the United States Court of Appeals for the Third Circuit from 1992 to 1999 and Judge of the United States District Court for the Western District of Pennsylvania from 1991 to 1992. He was recognized as one of the "Lawdragon 500 Leading Judges in America" and is an Honorary Fellow of the American Academy of Appellate Lawyers.

Michael W. McConnell

Michael McConnell served as Judge of the United State Court of Appeals for the Tenth Circuit from 2002 to 2009, Member of President Ronald Reagan's and President George H.W Bush's Intelligence Oversight Board from 1988 to 1990, Assistant to the Solicitor General of the United States from 1983 to 1985, and Assistant General Counsel of the Office of Management and Budget from 1981 to 1983. He has taught constitutional law at various universities and is the author of the legal casebooks The Constitution of the United States and Religion and the Constitution. He has argued 15 cases before the United States Supreme Court and has been recognized in The Legal 500 U.S. for his United States Supreme Court and appellate practices.

Kenneth W. Starr

Kenneth Starr served as Solicitor General of the United States from 1989 to 1993 and Judge of the United States Court of Appeals for the District of Columbia Circuit from 1983 to 1989. He has argued 36 cases before the United States Supreme Court, including 25 cases during his service as Solicitor General. He also served as an Independent Prosecutor in five investigations and as a law clerk to Chief Justice Warren E. Burger of the United State Supreme Court from 1975 to 1977.

Deanell Reece Tacha

Deanell Tacha served for 25 years on the United States Court of Appeals for the Tenth Circuit. Appointed by President Reagan in 1986, she also served as Chief Judge of the Circuit from 2001-2007 and retired in 2011. Prior to her service on the bench, Judge Tacha was a White House Fellow (1971-972), directed the Douglas County (Kansas) Legal Aid Clinic from 1974 to 1977 and was a professor and associate dean at the University of Kansas School of Law.

William H. Webster

William Webster served as Director of the Central Intelligence Agency from 1987 to 1991, Director of the Federal Bureau of Investigation from 1978 to 1987, Judge of the United States Court of Appeals for the Eight Circuit from 1973 to 1978, and Judge of the United States District Court for the Eastern District of Missouri. During his service on the bench, he was Chairman of the Judiciary Conference Advisory Committee on the Criminal Rules and was a member of the Ad Hoc Committee on Habeas Corpus and the Committee of Court Administration. He has received numerous honors for his service and contributions to the law, including the Presidential Medal of Freedom, the National Security Medal, the American Bar Association Medal, the American Judicature Society's Justice Award, and the American Law Institute's Henry J. Friendly Medal for outstanding contributions to the law.

Michael A. Wolff

Michael Wolff served as Justice of the Supreme Court of Missouri from 1998 to 2011 and served as Chief Justice for the term starting on July 1, 2005 and ending on June 30, 2007. During his time on the bench, he served as Chair of the Missouri Sentencing Advisory Commission, received the Missouri Bar's Theodore McMillian Judicial Excellence Award, and was named "Lawyer of the Year" by Missouri Lawyers' Weekly.

No. 15-5040

IN THE

Supreme Court of the United States

TERRANCE WILLIAMS,

Petitioner,

v.

PENNSYLVANIA,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR *AMICI CURIAE* FORMER JUDGES WITH PROSECUTORIAL EXPERIENCE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

Pursuant to Supreme Court Rule 37, *amici curiae* respectfully submit this brief in support of Petitioner Terrance Williams. As former prosecutors who later became judges, the undersigned have a special interest in preserving the legitimacy and integrity of both prosecutors' offices and the judiciary. The perceived impartiality of the judiciary is central to this concern. *See Republican Party of Minnesota v. White*, 536 U.S. 765, 817-18 (2002) (Ginsburg, J., dissenting) ("Because courts control neither the purse nor the sword, their authority ultimately rests on public faith in those who don the robe."). *Amici* recognize the complexity of the decisions that jurists are required to make in determining whether to participate in a case, and the difficulties in assessing personal motives and biases that often accompany those decisions. *Amici* are especially cognizant of the risks of an overreaching recusal rule, and do not favor a broad expansion of this Court's due process recusal jurisprudence. Nevertheless, Chief Justice Ronald Castille's failure to recuse himself in Petitioner's case before the Pennsylvania Supreme Court is one of those egregious cases where a narrowly-tailored application of existing case law requires recusal.

In this death penalty case, Chief Justice Castille of the Pennsylvania Supreme Court served as District Attorney of Philadelphia when Petitioner was originally tried and convicted of murder. As the District Attorney, Chief Justice Castille personally authorized

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[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution to the preparation or submission of this brief. Letters from all parties consenting to the filing of this brief are on file with the Clerk. A list of *amici* is submitted as an appendix to this brief.

the prosecutors in his office to pursue the death penalty against Petitioner. Later, when he ran for election to the Pennsylvania Supreme Court, he campaigned on the fact that he had personally sent numerous defendants, including Petitioner, to death row.

Petitioner's case ultimately reached the Pennsylvania Supreme Court on the Commonwealth's appeal of a grant of post-conviction relief to the Petitioner. The post-conviction court found that the Philadelphia District Attorney's Office, with Chief Justice Castille in charge, had failed to turn over exculpatory evidence that was relevant to the penalty phase of Petitioner's trial, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *See generally Commonwealth v. Williams*, No. CP-51-CR-0823621-1984 (Phila. Ct. Common Pleas Nov. 27, 2012). Thus, Chief Justice Castille and the other six justices of the Pennsylvania Supreme Court were tasked with deciding whether the prosecutors that had acted on Chief Justice Castille's behalf had violated Petitioner's constitutional rights.

For the reasons discussed in more detail below, Chief Justice Castille's failure to disqualify himself from participation in that appeal violated Petitioner's rights under the Fourteenth and Eighth Amendments. The failure to recuse also undermined the legitimacy of the Pennsylvania Supreme Court, and indeed the judicial system as a whole. Accordingly, *amici* respectfully request that this Court reverse the judgment of the Pennsylvania Supreme Court and remand for new proceedings that are not tainted by the participation of a jurist who was also involved in the prosecution, conviction, and sentencing to death of the Petitioner.

SUMMARY OF ARGUMENT

This Court's due process jurisprudence requires an objective assessment of a judge's relationship to a case to assess whether recusal is constitutionally required. Under existing case law, recusal is required where the judge could potentially be tempted "not to hold the balance nice, clear and true between the state and the accused," *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), either because of (1) his relationship to the parties, or (2) an interest in a particular outcome.

Chief Justice Castille's participation in the appeal before the Pennsylvania Supreme Court is problematic for both of these reasons. Because he previously served as the prosecutor who authorized the pursuit of the death penalty against Petitioner, and later campaigned for election to the Supreme Court based in part on successfully obtaining a death sentence against Petitioner, Chief Justice Castille's prior relationship to Petitioner and to the Philadelphia District Attorney's office created an unconstitutional risk that he would not be able to decide the case fairly. Additionally, the nature of the claim before the Pennsylvania Supreme Court – namely, that the Philadelphia District Attorney's Office, under Chief Justice Castille's supervision, withheld exculpatory evidence that could have affected the sentence that Petitioner received – directly implicated the legal and ethical conduct of the Philadelphia District Attorney's Office during Justice Castille's tenure.

These extraordinary circumstances required that Chief Justice Castille disqualify himself from participating in Petitioner's appeal before the Pennsylvania Supreme Court. Additionally, because Chief Justice Castille's participation in that appeal also ultimately increased the risk that a sentence of death

would be imposed on Petitioner, the failure to recuse violated Petitioner's Eighth Amendment rights.

Accordingly, as discussed in more detail below, a narrow application of existing Fourteenth and Eighth Amendment precedent requires that the judgment of the Pennsylvania Supreme Court be reversed, and Petitioner's case be remanded for reconsideration without allowing Chief Justice Castille's participation to infect the perceived impartiality of the court's decision.

ARGUMENT

I. CHIEF JUSTICE CASTILLE'S FAILURE TO RECUSE HIMSELF UNDER THE CIRCUMSTANCES OF THIS CASE VIOLATED PETITIONER'S FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

A. The Fourteenth Amendment demands recusal where there is an unconstitutionally high risk that the judge might be unable to fairly decide a case.

Judicial recusal has always played an important role in the perceived impartiality of the courts. *See Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009) (explaining that judicial codes of conduct that set forth requirements for recusal "serve to maintain the integrity of the judiciary and the rule of law"); *White*, 536 U.S. at 817-18 (Ginsburg, J., dissenting); *Mistretta v. United States*, 488 U.S. 361, 407 (1989) (recognizing the important role that recusal plays in eliminating judicial bias in individual cases); *see also Gormley v. Lan*, 438 A.2d 519, 526 (N.J. 1981) ("The appearance of impartiality is as important to judicial effectiveness and legitimacy as impartiality

itself . . . ."). By and large, recusal is policed by "common law, statute, or the professional standards of the bench and bar." *Caperton*, 556 U.S. at 892 (Roberts, C.J., dissenting) (internal quotation marks omitted). However, there are certain "extraordinary situation[s] where the Constitution requires recusal." *Id.* at 887. This is one of those situations.

Chief Justice Castille's prior relationship to Petitioner's case, and the interest that he had in its outcome, created an impermissible risk that he would be unable to decide the case fairly. Even if Chief Justice Castille was not actually biased in this case, the risk of bias alone seriously undermined "the need to maintain a fair, independent, and impartial judiciary—and one that appears to be such" that Chief Justice Roberts recognized was so important in his dissent in *Caperton*. *Id.* at 890 (Roberts, C.J., dissenting). As discussed below, existing precedent required Chief Justice Castille to disqualify himself, and the decision of the Pennsylvania Supreme Court should be reversed.

The Due Process Clause of the Fourteenth Amendment requires judges to recuse themselves where there exists a constitutionally impermissible risk of bias. This Court first examined the circumstances that require recusal in *Tumey*. In that case, the mayor of a village arrested the defendant and charged him with possession of alcohol. 273 U.S. at 515. The mayor also served as the judge in the case, trying and convicting the defendant of the offense, and ordering him to pay a fine. *Id.* Under a village ordinance, the mayor received a percentage of any fine that was collected, and the remainder of the fine funded a portion of the village's operating budget. *Id.* at 518.

The Court held that due process required the judge to recuse himself, even if the judge's financial interest in the litigation did not in fact influence his decision. *See id.* at 532 ("There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice."). In other words, *Tumey* established an objective test to assess whether due process requires a judge to disqualify himself. As the *Tumey* court put it, "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him to not hold the balance nice, clear and true between the state and the accused denies the latter due process of law." *Id.* The "direct, personal, substantial pecuniary interest" of the judge in *Tumey* was one such example of the sort of "possible temptation" that prohibited the judge from deciding the case in a manner that was consistent with due process. *Id.* at 523. Accordingly, the remedy that due process required was that the judge disqualify himself from hearing the case.

Tumey's objective test has been consistently applied in this Court's jurisprudence. Over the years, the Court has found other "possible temptation[s]," *id.* at 532, that require a judge to recuse himself to comport with due process. There are essentially two areas in which the judge's interest in a particular case is so substantial that recusal is required: (1) where a judge would be unlikely to be able to decide a case fairly based on his relationship to one of the parties; or (2) where the threat of impartiality exists because the

judge has a direct interest in a particular outcome of the case.

This Court first examined a relationship between a judge and a litigant that required recusal in *In re Murchison*, 349 U.S. 133 (1955). In *Murchison*, a state court judge indicted two defendants as a "one-man grand jury" pursuant to state procedures, and proceeded to try and convict them. *Id.* at 134-35. The Court noted that after being a part of the accusatory process, a judge "cannot be . . . wholly disinterested in the conviction or acquittal of those accused." *Id.* at 137. Thus, due process is violated where a single judge both "act[s] as a grand jury and then tr[ies] the very persons accused as a result of his investigations." *Id.*

The next case that considered judicial bias against a litigant was *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). In that case, a judge found two *pro se* criminal defendants guilty of criminal contempt based on their conduct at their earlier criminal trial, which that same judge had presided over. *See id.* at 455. The conduct that formed the basis of the contempt charges was egregious. Collectively, the co-defendants insulted the judge's intelligence and impartiality, used profanity in the courtroom, and repeatedly failed to follow instructions. *See generally id.* at 456-62. Under these circumstances, this Court held that due process prevented the judge from presiding over the criminal contempt proceedings. The Court found that the judge had been "embroiled in a running, bitter controversy" with the defendants during the trial, such that the risk of bias was impermissibly high because the judge had suffered "the sting of [the] slanderous remarks" that the defendants had made. *Id.* at 465-66. In short, due process required recusal because the prior history

between the judge and the defendants could diminish the judge's ability to decide the case fairly.[2]

Recusal is also required where the judge has a direct interest in a particular outcome of a case that could threaten his impartiality. Following *Tumey*, the next case to find that such an interest was present was *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). *Ward* is similar to *Tumey* in that it examined the ability of a mayor to adjudicate certain cases and assess fines on individuals that he found guilty. Unlike in *Tumey*, however, the mayor in *Ward* did not *personally* benefit financially from the fines that he assessed. Nevertheless, the Court held that due process prohibited the mayor from hearing those cases because "the revenue produced . . . provide[d] a substantial portion of [the] municipality's funds," and "the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Id.* at 60. In other words, recusal was required because acting as both the mayor and the judge were "two practically and seriously inconsistent positions" that could potentially compromise the mayor's ability to decide the cases against the accused impartially, even though no personal financial interest was at stake.[3] *Id.*

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[2] This Court has also addressed recusal in the context of criminal contempt charges in *Johnson v. Mississippi*, 403 U.S. 212 (1971). There, the Court held that a judge was constitutionally required to disqualify himself from presiding over contempt proceedings where he had made "intemperate remarks . . concerning civil rights litigants" and was recently a losing party in a civil rights lawsuit involving the person accused of contempt. *Id.* at 215-16.

[3] *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986) also addressed recusal because of a judge's interest in the outcome of

The most recent case to examine a circumstance in which due process requires recusal is *Caperton*. In that case, a West Virginia jury found A.T. Massey – a coal company – liable for fraudulent misrepresentation, concealment, and tortious interference with contractual relations, and ordered A.T. Massey to pay $50,000,000 in damages. *Caperton*, 556 U.S. at 872. Shortly after the jury's verdict, West Virginia held an election to select the justices of its state supreme court. *Id.* at 873. Don Blankenship, an officer of A.T. Massey, spent millions of dollars to support the election of Brent Benjamin to the West Virginia Supreme Court, and Benjamin won the election. *Id.*

When the appeal of the jury's verdict reached the West Virginia Supreme Court, Justice Benjamin was asked, and refused, to recuse himself in both the state high court's original consideration of the case and on rehearing. In both instances, Justice Benjamin voted with the majority to reverse the jury's verdict. *Id.* at 874. This Court granted certiorari to consider whether due process required Justice Benjamin to recuse himself from the case. *Id.* at 872.

The Court began its analysis by confirming that *Tumey*'s objective test remains the appropriate inquiry, stating that "[t]he inquiry is an objective one. The

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a case. There, this Court held that a justice of the Alabama Supreme Court could not participate in a case that decided the validity of bad-faith-refusal-to-pay claims against insurance companies because he was a plaintiff in two lawsuits against insurance companies that asserted those types of claims. *Id.* at 817. Thus, the Alabama Supreme Court's decision, which found bad-faith-refusal-to-pay claims to be valid, "undoubtedly 'raised the stakes'" in the justice's participation in his own lawsuits. *Id.* at 824.

Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* at 881. This unconstitutionally high risk of bias exists where "'experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* at 877 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Put another way, the task is to engage in a "'realistic appraisal of psychological tendencies and human weakness,'" *Caperton*, 556 U.S. at 883 (quoting *Withrow*, 421 U.S. at 47), in order to assess whether "the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883-84 (quoting *Withrow*, 421 U.S. at 47).

Applied to the facts of *Caperton*, this Court held that "there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." *Caperton*, 556 U.S. at 884. The Court reasoned that "[i]t was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice." *Id.* at 886. And those campaign contributions "had a significant and disproportionate influence on the electoral outcome." *Id.* at 885. Because of these two facts, there is a risk that Justice Benjamin "would . . . feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected," such that there could have been a "possible temptation to the

average judge to lead him not to hold the balance nice, clear and true." *Id.* at 882, 886 (alterations and internal quotation marks omitted). Hence, the risk of actual bias was too great to allow Justice Benjamin to hear the appeal, and his recusal was required by due process.

Tying the two strands of this Court's due process recusal jurisprudence together, recusal is required by the Fourteenth Amendment where the judge's prior relationship to the case or one of the parties, or his interest in the outcome, create an impermissible temptation "not to hold the balance nice, clear and true." *See Tumey*, 273 U.S. at 532. As discussed in more detail below, both of these factors required Chief Justice Castille to recuse himself in Petitioner's case.

B. Chief Justice Castille's former position in the prosecutor's office required him to recuse in a subsequent post-conviction proceeding about whether that office withheld exculpatory evidence.

Three circumstances of Petitioner's case are relevant to the due process inquiry and raise concerns that a reasonable jurist in Chief Justice Castille's position would be tempted to "not hold the balance nice, clear and true" in deciding the Commonwealth's appeal before the Pennsylvania Supreme Court. *See id.* First, Chief Justice Castille was the former Philadelphia District Attorney and, in that role, personally authorized the pursuit of the death penalty against Petitioner. Second, when Chief Justice Castille campaigned for a seat on the Pennsylvania Supreme Court, he publicly emphasized that he sent numerous defendants, including Petitioner, to death row. Third,

the nature of the case before the Pennsylvania Supreme Court created a risk that a reasonable jurist in Chief Justice Castille's position would be biased. The Commonwealth was appealing a lower court's determination that Petitioner was entitled to a resentencing because the Philadelphia District Attorney's Office, under Chief Justice Castille's leadership, had failed to turn over exculpatory evidence, leading to an unconstitutional death sentence, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

Chief Justice Castille's relationship to this case implicates both strands of this Court's due process jurisprudence. As discussed in more detail below, his role in the case as the district attorney and his public emphasis on his successful death penalty prosecutions created a risk of bias based on his prior relationship to the case that is comparable to the risk found to be constitutionally intolerable in *Murchison*. Chief Justice Castille also had an impermissible interest in the outcome of Petitioner's case, in that he had a "direct, personal, [and] substantial" interest in concluding that the Philadelphia District Attorney's Office did not commit *Brady* violations on his watch. *See Lavoie*, 471 U.S. at 824 (quoting *Ward*, 409 U.S. at 60). This interest in the outcome is similar to those that were found to violate due process in *Ward* and, most recently, *Caperton*.

1. *Chief Justice Castille's prior relationship to Petitioner as the Philadelphia District Attorney created a constitutionally intolerable risk of bias akin to the one found in* Murchison.

As stated above, Chief Justice Castille was the District Attorney of Philadelphia at the time of

Petitioner's original conviction and sentencing. In that role, the Chief Justice was the City of Philadelphia's chief prosecutor and bore the ultimate responsibility for decisions made by the attorneys in his office. He also served as the public personification of the entire organization. Significantly, the National Prosecution Standards of the National District Attorneys Association describe the chief prosecutor as "the elected official ultimately responsible to the community for the performance of the prosecution function." Nat'l Dist. Att'ys Ass'n, Nat'l Prosecution Stds., 3d Ed., at 14, *available at* http://www.ndaa.org/pdf/NDAA%20NPS%203rd%20Ed.%20w%20Revised%20Commentary.pdf; *see also* David A. Harris, *The Interaction and Relationship Between Prosecutors and Police Officers in the United States, and How this Affects Police Reform Efforts*, *in The Prosecutor in Transnational Perspective* 59-60 (Erik Luna & Marianne Wade, eds., 2012) ("The elected prosecutor sets office policy, hires and fires staff, serves as the public face of the office, and sometimes makes important decisions in individual cases . . . . The elected nature of the position means that the state prosecutor is ultimately accountable only to the voters of the jurisdiction."); Geoffrey S. Corn & Adam M. Gershowitz, *Imputed Liability for Supervising Prosecutors: Applying the Military Doctrine of Command Responsibility to Reduce Prosecutorial Misconduct*, 14 Berkeley J. Crim. L. 395, 419 (2009) (investigating the dynamics of prosecutors' offices and concluding that "[l]eaders possess an unrivaled capacity to define operational culture"). Hence, the chief prosecutor assumes responsibility for the activities of the entire District Attorney's office, both institutionally and in the eyes of the public.

Given this reality, the actions of the prosecutors who report to the District Attorney are imputed to the chief prosecutor in a disqualification analysis. *Cf. United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994) ("Responsibility for prosecution and the precedent investigation is that of the United States Attorney in his district; other attorneys are only his assistants."); *United States v. Ostrer*, 597 F.2d 337, 339 n.4 (2d Cir. 1979) ("Even if [the former prosecutor] did not review these papers himself, knowledge of their contents is imputable to him because of his supervisory status."). This is particularly true in light of the public legitimacy concerns that underlie this Court's due process recusal jurisprudence. *See Caperton*, 556 U.S. at 889 (noting that judicial codes of conduct that prohibit the appearance of bias "serve to maintain the integrity of the judiciary and the rule of law"); *see also Mistretta*, 488 U.S. at 407 ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). Accordingly, because the District Attorney is ultimately responsible for all of his office's prosecutions, both institutionally and in the eyes of the community, the actions of *all* of the Philadelphia Assistant District Attorneys, including those that directly prosecuted the Petitioner, must imputed to Chief Justice Castille in due process analysis.

Moreover, even if the actions of all of the prosecutors in the district attorney's office were not imputed to Chief Justice Castille, his own personal involvement in Petitioner's case warranted recusal. As the Philadelphia District Attorney, Chief Justice Castille personally authorized the pursuit of the death penalty against Petitioner. This decision necessarily required that Chief Justice Castille evaluate the circumstances of the case against Petitioner and assess whether

there was a good faith basis for arguing that the death penalty was justified. *See* Pa. R. Prof. Conduct 3.8(a) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."). In other words, in deciding whether to seek the death penalty against Petitioner as a prosecutor, Chief Justice Castille necessarily formed an opinion about whether the death penalty was appropriate in Petitioner's case, and therefore could not approach the Commonwealth's appeal from the neutral perspective that due process requires. Given this prior involvement, Chief Justice Castille's participation in Petitioner's case seriously impugns the public perception of the judiciary and threatens the integrity and legitimacy of the judicial process. *See Mistretta*, 488 U.S. at 407.

More fundamentally, Chief Justice Castille's likely preconceived notions about the appropriate outcome in Petitioner's case are the antithesis of the impartial review that the Fourteenth Amendment demands, and are akin to the interest of the judge in *Murchison* who this Court held was constitutionally required to recuse. In that case, this Court found that a judge who had accused a witness of criminal contempt could not try the witness on that same charge because, "[h]aving been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *In re Murchison*, 349 U.S. at 137. Just as in *Murchison*, where it would be "difficult if not impossible" for the judge to "free himself from the influence of what took place" during the previous grand jury proceedings, *id.* at 138, it would be similarly difficult or impossible for Chief Justice Castille to escape the influence of the view of Petitioner's case that he developed when it was prosecuted under his direction. Indeed,

Murchison intimates that a former prosecutor would have an *even more difficult* time distancing himself from the role that he played, and the opinion of the case that he formed, while in that office. *See id.* ("While [the judge] would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal.").

There is a wealth of evidence to suggest that reasonable jurists in the Chief Justice's position are likely to be biased in this sort of situation. Numerous advisory opinions of the relevant ethical authorities in several states indicate that recusal is ethically required under the circumstances of this case. *See, e.g.*, N.Y. Ethics Opinion 89-117 (Oct. 24, 1989), *available at* http://www.courts.state.ny.us/ip/judicial ethics/opinions/89-117.htm ("A judge who previously was employed as a county attorney may not preside over matters in which the judge formerly was the attorney of record, whether or not the judge personally had participated in the case."); State Bar of Michigan, Advisory Opinion JI-34 (Dec. 21, 1990) ("[A] judge who was the chief prosecutor in the county is disqualified from hearing any portion of a criminal or civil case involving the state or county which was initiated or pending while the judge served as a prosecutor."); Indiana Comm'n on Judicial Qualifications, Advisory Opinion # 3-89 ("A former Prosecuting Attorney is disqualified from any criminal proceeding initiated, investigated, filed, or pursued by the office of the Prosecuting Attorney during the judge's term as prosecutor. Even if the prosecutor did not actively prosecute the cause or has no recollection of it at all, disqualification is necessary . . . . [T]he ideals of judicial independence and the appearance thereof are accomplished only upon the disqualification of a former Prosecuting Attorney in a case filed during his

term."); Judicial Ethics Advisory Committee of the State of Delaware, JEAC 2007-3 (June 29, 2007) ("Presiding over a criminal case that was filed during your tenure as Attorney General – or a criminal case that, having been earlier filed, was prosecuted during your time in office – creates the appearance of impropriety and gives rise to reasonable questions concerning your impartiality. This advice applies equally to such cases despite that you were neither personally nor substantially involved in the prosecution of those cases.").

Of course, these opinions are not determinative of the constitutional question, as "States may choose to adopt recusal standards more rigorous than due process requires." *Caperton*, 556 U.S. at 889. Nevertheless, the consensus of opinions on this subject suggests that this is exactly the sort of circumstance where, viewed objectively, the risk of judicial bias is elevated. At a minimum, those advisory opinions reflect the perception of a bias that inevitably results from the refusal to recuse.

The second circumstance of this case that contributes to the inescapable conclusion that Chief Justice Castille was required to recuse himself is the fact that, during his campaign for election to the Pennsylvania Supreme Court, he expressed strong support for the death penalty by publicly emphasizing that he sent numerous defendants – including Petitioner – to death row. *See, e.g.*, Lynn A. Marks & Ellen Mattleman Kaplan, "Disorder in the Courts," *Pittsburgh Post-Gazette*, Nov. 14, 1993, *available at* 1993 WLNR 2150772; Lisa Brennan, "State Voters Must Choose Next Supreme Court Member," *Legal Intelligencer*, Oct. 28, 1993, *available at* https://advance.lexis.com/api/permalink/a7f1fe95-55f4-4534-9b46-542d8af93e99/

context=1000516; Katharine Seelye, "Castille Keeps His Cool in Court Run," *Phila. Inquirer*, Apr. 30, 1993, at 1993 WLNR 1997262. Undoubtedly, statements made in favor of the death penalty during a judicial campaign are protected by the First Amendment and should not mandate that a judge recuse himself in all subsequent death penalty prosecutions. *See White*, 536 U.S. at 788 (2002). However, the comments that Chief Justice Castille made during his election campaign are relevant to the due process inquiry under the unique circumstances of this case because they demonstrate that, as reflected in his own public statements, the Chief Justice considered himself to be personally responsible for the death penalty convictions that the Philadelphia District Attorney's Office obtained during his tenure. Indeed, it is difficult to believe that Chief Justice Castille would boast of his sending forty-five individuals to death row unless he was convinced that each and every one of them deserved the death penalty and that it was an appropriate sentence under the law.[4] Chief Justice Castille's comments further indicate that he

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[4] Chief Justice Castille's comments about his involvement in the decision to authorize the death penalty in cases that he supervised as the Philadelphia District Attorney have been contradictory, thereby further undermining public confidence in the judiciary. During his electoral campaign, Chief Justice Castille emphasized that he was responsible for sending defendants to death row. By contrast, when asked to recuse himself on those grounds, Chief Justice Castille distanced himself from that decision, saying that his role in the authorization of the death penalty in the Philadelphia District Attorney's Office was merely an "administrative formality" that "simply represented a concurrence in their judgment that the death penalty statute applied, i.e., that one or more of the statutory aggravating circumstances existed, and nothing more." *See Commonwealth v. Rainey*, 912 A.2d 755, 757-58 (Pa. 2006) (Castille, J.).

had already formed an opinion about Petitioner's case and therefore it would be exceedingly difficult for a reasonable judge in Chief Justice Castille's position to approach the case with the degree of impartiality that is required by the Constitution. In other words, this is one of the "circumstances 'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Caperton*, 556 U.S. at 877 (quoting *Withrow*, 421 U.S. at 47).

2. *Given the nature of Petitioner's claim, Chief Justice Castille's interest in the outcome of the case demanded disqualification.*

As mentioned above, Petitioner's case was before the Pennsylvania Supreme Court because the Commonwealth had appealed a post-conviction court's grant of a resentencing based on the failure of the Philadelphia District Attorney's Office to turn over certain exculpatory evidence, in violation of *Brady*. Specifically, the post-conviction court found that the Philadelphia District Attorney's Office had both failed to disclose exculpatory evidence and "affirmative[ly] misrepresent[ed] . . . that such evidence did not exist." *Williams*, slip op. at 25. That court also found that "the government interfered with the presentation of evidence" during the original trial, *id.* at 18, and that "[t]hough the government suppressed only a few choice statements, the impact of suppression was far-reaching," and "would have changed at least one juror's view" of the victim. *Id.* at 50. In short, Petitioner had established that the Philadelphia District Attorney's Office had violated his right to due process at the penalty phase of his original trial. At

that time, the Philadelphia District Attorney's Office operated under Chief Justice Castille's direction.

Given the nature of the post-conviction court's findings, Chief Justice Castille's participation in the appeal of this decision violated due process. On appeal, the Chief Justice was asked to determine whether the Philadelphia District Attorney's Office had infringed a criminal defendant's constitutional rights in a death penalty case investigated and prosecuted on his watch. *See Brady*, 373 U.S. at 87 ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").[5] Even though Chief Justice Castille was no longer affiliated with the District Attorney's office when Petitioner's case reached the Pennsylvania Supreme Court, it would be exceedingly difficult for a reasonable judge in his position not to view the findings of the post-conviction court as an affront to his leadership and supervision of the District Attorney's Office, and as a poor reflection of his tenure as District Attorney. In short, Chief Justice Castille would have had a "'direct, personal, substantial'" interest in the outcome of Petitioner's

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[5] Notably, the post-conviction court's findings here suggest that the Philadelphia District Attorney's Office did not act in good faith. *See Williams*, slip op. at 25 (discussing the Philadelphia District Attorney's Office's *affirmative misrepresentation* that the exculpatory evidence that Petitioner requested did not exist). This finding further suggests that Chief Justice Castille would not be able to impartially evaluate Petitioner's claim, as the perceived negative reflection on Chief Justice Castille's tenure as the Philadelphia District Attorney would be exponentially greater than a situation where the District Attorney's Office had simply made a mistake.

appeal. *See Caperton*, 556 U.S. at 876 (quoting *Tumey*, 273 U.S. at 523).

Indeed, the "official motive" that Chief Justice Castille likely would have had to conclude that the Philadelphia District Attorney's Office acted appropriately is analogous to the previous situations in which this Court has held that a judge must recuse himself because of an impermissible interest in the outcome of the case. *Id.* at 878. Just as the mayor/judge in *Ward* had an incentive to manage the village finances as best he could, 490 U.S. at 60, Chief Justice Castille had a similar incentive to rule in favor of the Philadelphia District Attorney's Office in this case. A finding that the District Attorney's Office withheld exculpatory evidence in violation of Petitioner's constitutional rights would necessarily require Chief Justice Castille to conclude that the Philadelphia District Attorney's Office made a serious error during his tenure, thereby negatively impacting the public assessment of his performance as District Attorney, just as a finding of innocence by the mayor/judge in *Ward* would reflect negatively upon the mayor/judge's performance of his executive duties. In both circumstances, making such an assessment is "practically and seriously inconsistent" with the role of a judge. *Id.* In Chief Justice Castille's case, it also violates the maxim set forth by this Court in *Murchison* that "no man can be judge in his own case," as Chief Justice Castille was being asked to indirectly evaluate his own performance as District Attorney. *See* 349 U.S. at 136.

Caperton further demonstrates that due process mandated Chief Justice Castille's disqualification. The nature of Petitioner's claim is likely to especially implicate Chief Justice Castille's feelings of loyalty toward the Philadelphia District Attorney's Office in

the way that an ordinary case would not. These feelings of loyalty are analogous to the "debt of gratitude" the justice in *Caperton* may have felt toward one of the litigants, and the risk that sentiment could have influenced the Chief Justice's decision in this case is constitutionally intolerable. *See Caperton*, 556 U.S. at 882.

This is not to suggest that recusal would be constitutionally required in every single case involving the Philadelphia District Attorney's Office that makes its way to the Pennsylvania Supreme Court. But this is not an ordinary case. Here, the Pennsylvania Supreme Court was asked to assess whether the Philadelphia District Attorney's Office violated Petitioner's constitutional rights by failing to turn over exculpatory evidence *under Chief Justice Castille's watch*. Under these extraordinary circumstances, Chief Justice Castille would likely feel an allegiance to the prosecutors that he supervised whose actions were in question. This allegiance is compounded by the fact that, unlike in *Caperton*, deciding this case in Petitioner's favor would have reflected poorly on Chief Justice Castille himself, as the District Attorney who was ultimately responsible for the actions of that office. Thus, not only was Chief Justice Castille's recusal required by *Caperton*, but his participation in Petitioner's appeal was an even more significant violation of due process than the failure to recuse in *Caperton*.

Chief Justice Castille's participation in the Commonwealth's appeal is also analogous to that of the judge in *Mayberry v. Pennsylvania*, who this Court held was constitutionally barred from trying a defendant for contempt where he had become "embroiled in a running, bitter controversy" with the person accused

of contempt. 400 U.S. at 465. Just as "[n]o one so cruelly slandered [as the judge in *Mayberry*] is likely to maintain that calm detachment necessary for fair adjudication," *id.*, a former District Attorney who is being asked to weigh in on a claim that directly implicates the integrity of the office he managed likely will be unable to impartially evaluate such a claim, the very nature of which questions Chief Justice Castille's aptitude as a former District Attorney. Importantly, a decision in favor of the Petitioner would unequivocally cast Chief Justice Castille's prior work as a District Attorney in an unfavorable light.

For this reason, there is a substantial risk that Chief Justice Castille's natural inclination would be to attempt to justify the prior actions of those he supervised, just as anyone who is acting in his own rational self-interest would likely do. That risk necessitates recusal, and the failure to do so violates due process.

The damage to the perceived impartiality of the judiciary, and therefore the legitimacy of the Pennsylvania Supreme Court's decision, caused by Chief Justice Castille's participation in Petitioner's appeal is illustrated by certain statements he made in a concurring opinion in this case. *Cf. White*, 536 U.S. at 817-18 (Ginsburg, J., dissenting); *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice."). In that opinion, the Chief Justice revealed a long-standing animus against the Federal Community Defender's Office ("FCDO"), which represented Petitioner in his post-conviction proceedings, including before the Pennsylvania Supreme Court. He harshly criticized the FCDO, stating that it had engaged in "multiple attempts to delay and obstruct cases, as well as attempts to

unsettle and undermine Pennsylvania law." *Commonwealth v. Williams*, 105 A.3d 1234, 1246 (Pa. 2014) (Castille, C.J., concurring). Chief Justice Castille's concurrence also characterized the FCDO as having turned Pennsylvania post-conviction proceedings "into a circus where FCDO lawyers are the ringmasters, with their parrots and puppets as a sideshow," *id.* at 1247, and described the FCDO's litigation strategy as one of "multiple attempts to delay and obstruct cases, as well as attempts to unsettle and undermine Pennsylvania law." *Id.* at 1246. Even more shockingly, at one point in that concurring opinion, the Chief Justice even intimates that Petitioner's application for post-conviction relief was less credible *by virtue of the fact that it was made by a lawyer who worked for the FCDO*. *See id.* at 1250 (Castille, C.J., concurring) ("[Petitioner's case] was not an ordinary case, but not for the reason cited by the court: it was a last-ditch fourth state collateral petition, *filed by the FCDO no less*, after federal review had concluded, rehashing old claims that just happened to involve a two-time murderer finally facing the execution of his sentence." (emphasis added)).

Indeed, upon reading Chief Justice Castille's concurring opinion in this case, one is left with the distinct impression that Petitioner's case was doomed from the start, simply because of the organization that represented him. Even if that is not actually true, this sort of impression seriously undermines the legitimacy of the Pennsylvania Supreme Court's opinion, particularly because of Chief Justice Castille's previous position as the Philadelphia District Attorney. Whether accurate or not, the perception is that the Chief Justice is either unable or unwilling to separate

himself from the mindset of a prosecutor in assessing the veracity of the Petitioner's claims.[6]

3. Chief Justice Castille's recusal was required even if he was not actually biased in the consideration of Petitioner's case.

The influences on Chief Justice Castille discussed above do not, of course, compel the conclusion that he was actually biased in concluding that the post-conviction court's grant of post-conviction relief should be reversed. It is entirely possible that Chief Justice Castille carefully evaluated the above combination of influences and concluded, after a "probing search into his actual motives and inclinations," that he could decide this case impartially. *See Caperton*, 556 U.S. at 882. That, however, is not the inquiry that the Constitution demands.

This Court has consistently reaffirmed that the due process inquiry into judicial bias is an objective one. *See, e.g., id.* at 881 ("The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'"); *Tumey*, 273 U.S. at 532 ("There are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it, but the requirement of due process of law in judicial

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[6] Notably, not all judges share Chief Justice Castille's low opinion of the FCDO. On the contrary, at least one federal judge has described the services that the FCDO provides in death penalty cases as that of "highly qualified defense counsel." *In re Commonwealth's Motion to Appoint Counsel Against or Directed to Def. Ass'n of Phila.*, 790 F.3d 457, 481 (3d Cir. 2015) (McKee, C.J., concurring).

procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice."). There is good reason for this rule. It is exceedingly difficult to inquire into and identify actual bias, even with the most searching of inquiries. *Caperton*, 556 U.S. at 883. An objective standard is also important because it allows for more effective review of recusal decisions. As this Court recognized in *Caperton*, "[t]he judge's own inquiry into actual bias . . . is not one that the law can easily superintend or review." *Id.*

In deciding not to recuse himself in Petitioner's case before the Pennsylvania Supreme Court, Chief Justice Castille undoubtedly concluded that, in his own subjective view, he could ignore the influences discussed above and decide Petitioner's case fairly. *Amici* do not question the correctness of Chief Justice Castille's personal assessment of his bias. However, even assuming that Chief Justice Castille could in fact decide Petitioner's case impartially, due process requires more. Given the Chief Justice's relationship to Petitioner's case, the *risk* that he would allow "psychological tendencies and human weakness" to creep into his decision in the case was simply too great to comport with due process, and Chief Justice Castille was required to recuse himself. *See id.* at 883-84 (internal quotation marks omitted).

II. BECAUSE THIS IS A DEATH PENALTY CASE, CHIEF JUSTICE CASTILLE'S FAILURE TO RECUSE HIMSELF ALSO VIOLATED THE EIGHTH AMENDMENT.

This Court has previously recognized that the Eighth Amendment creates a "heightened need for reliability in the determination that death is the

appropriate punishment in a specific case." *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985) (internal quotation marks omitted). Where that reliability is compromised by procedural irregularities that "affect the fundamental fairness" of the imposition of a sentence of death, the Eighth Amendment is violated. *See id.* This is because, as Justice Stevens has explained,

> death is a different kind of punishment from any other which may be imposed in this country . . . . From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, *and appear to be*, based on reason rather than caprice or emotion."

Gardner v. Florida, 430 U.S. 349, 357-58 (1977) (opinion of Stevens, J.) (emphasis added); *see also Beck v. Alabama*, 447 U.S. 625, 638 (1980) ("To insure that the death penalty is indeed imposed on the basis of reason rather than caprice or emotion, we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination.") (internal quotation marks omitted). Because of the finality of a death sentence, any law that "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty" violates both the Fourteenth and Eighth Amendments. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

Chief Justice Castille's participation in the appeal of the grant of Petitioner's post-conviction relief impermissibly heightened the risk that Petitioner would ultimately face the death penalty, despite the existence of exculpatory evidence that could potentially warrant a lesser sentence. As discussed in detail above, the post-conviction court found that this exculpatory evidence had a "far-reaching" impact on the outcome of the penalty phase of Petitioner's trial and "would have changed at least one juror's view" of the victim, thereby potentially affecting the decision to impose the death penalty on Petitioner. *See Williams*, slip op. at 25.

The due process analysis above demonstrates that Chief Justice Castille's participation in Petitioner's case created an unacceptably high risk of bias. Because the Pennsylvania Supreme Court was ultimately tasked with deciding whether Petitioner was entitled to be resentenced, the risk that Chief Justice Castille could not impartially assess this critical issue compromised the reliability of the "determination that death is the appropriate punishment" in Petitioner's case. *See Caldwell*, 472 U.S. at 340. Hence, under this Court's precedents, Chief Justice Castille's failure to recuse himself violated the Eighth Amendment. *See Lockett*, 438 U.S. at 605.

CONCLUSION

For the foregoing reasons, Chief Justice Castille's participation in the Commonwealth's appeal of the grant of Petitioner's post-conviction relief violated the Fourteenth and Eighth Amendments. Accordingly, the *amici* respectfully urge this Court to reverse the judgment of the Pennsylvania Supreme Court, and to remand to allow that court to conduct new proceedings

that are not tainted by Chief Justice Castille's participation.

Respectfully submitted,

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December 7, 2015

APPENDIX

APPENDIX

LIST OF *AMICI CURIAE*

Leland Anderson served as a Deputy District Attorney in Denver from 1976 to 1979, and then as a District Court Judge for Colorado's First Judicial District from 1997 to 2007 In 2001, he was president of the Colorado District Judge's Association.

Arthur Burnett was an attorney in the United States Department of Justice's Criminal Division in 1958 and again from 1960 to 1965, and was an Assistant United States Attorney for the District of Columbia from 1965 to 1969. He then served as a United States Magistrate Judge for the District of Columbia from 1969 to 1975 and from 1980 to 1987. From 1987 until 2013, he served as a judge on the District of Columbia Superior Court.

Virginia Chavez served as a Deputy District Attorney for Boulder County, Colorado from 1979 to 1983 and as a Boulder County Judge from 1987 to 1993.

Robert Cindrich was United States Attorney for the Western District of Pennsylvania from 1978 to 1981, and served as District Judge for the United States District Court for the Western District of Pennsylvania from 1994 to 2004.

Jean Dubofsky was a Deputy Attorney General for the State of Colorado from 1975 to 1977, and served as a Justice on the Colorado Supreme Court from 1979 until 1987.

Bruce Einhorn served as Special Prosecutor and Chief of Litigation in the Office of Special Investigations at the United States Department of Justice from 1979 to 1990, and was a Judge for the

federal Los Angeles Immigration Court from 1990 to 2007.

Hal Hardin served as an Assistant District Attorney in Davidson County, Tennessee from 1968 to 1970, as a Circuit Court judge in Davidson County from 1975 to 1977, and as a Special Judge for the Tennessee Court of Appeals in 1977. He was the United States Attorney for the Middle District of Tennessee from 1977 until 1981.

Nathaniel R. Jones served as an Assistant United States Attorney for the Northern District of Ohio. He was later appointed as a judge on the United States Court of Appeals for the Sixth Circuit in 1979 and served until his retirement in 2002.

Gerald Kogan served in the Dade County, Florida State Attorney's office from 1960 to 1967, serving as an Assistant State Attorney and Chief Prosecutor in the Capital Crimes Division. He was appointed to the Florida Eleventh Judicial Circuit in 1980, and then to the Florida Supreme Court in 1987, serving as Chief Justice from 1996 until his retirement in 1998.

A. Melvin McDonald was a prosecutor in Arizona's Maricopa County Attorney's office from 1970 to 1974, before serving as Superior Court Judge for Maricopa County from 1974 to 1981 and then as United States Attorney for the District of Arizona from 1981 to 1985.

William Sessions was the United States Attorney for the Western District of Texas from 1971 to 1973. He then served as United States District Judge for the Western District of Texas from 1974 to 1987, including seven years as Chief Judge. In 1987, he was nominated to be Director of the Federal Bureau of Investigation, serving until 1993.

Herbert Stern served as United States Attorney for the District of New Jersey from 1971 to 1974, and then as United States District Judge for the District of New Jersey from 1974 to 1987.

Larry Turner prosecuted felony cases as an Assistant State's Attorney for the Eighth Judicial Circuit in Florida from 1970 until 1971, and then served as a Circuit Court judge for the Eighth Judicial Circuit from 1997 to 2004.

Russel Walker was appointed as District Attorney for North Carolina's Randolph and Montgomery counties, serving from 1979 until 1980. He then served as Special Superior Court Judge in North Carolina from 1982 to 1984, when he was elected Senior Resident Superior Court Judge, holding the position until his retirement in 2004.

Daniel Weinstein was Chief Assistant District Attorney of San Francisco from 1976 to 1978. He then served on the Municipal Court of San Francisco from 1978 to 1982 and on the Superior Court of San Francisco from 1982 to 1988, including a year as an Associate Justice Pro Tempore on the California Supreme Court.

Alfred Wolin served as a special assistant prosecutor for Union County, New Jersey in 1970 and as a municipal prosecutor for the Town of Westfield, New Jersey from 1973 to 1974. He was a judge on the Union County District Court and New Jersey Superior Court before being appointed to the United States District Court for the District of New Jersey in 1987, where he served until 2004.